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vs.

THE COMMONWEALTH OF VIRGINIA.

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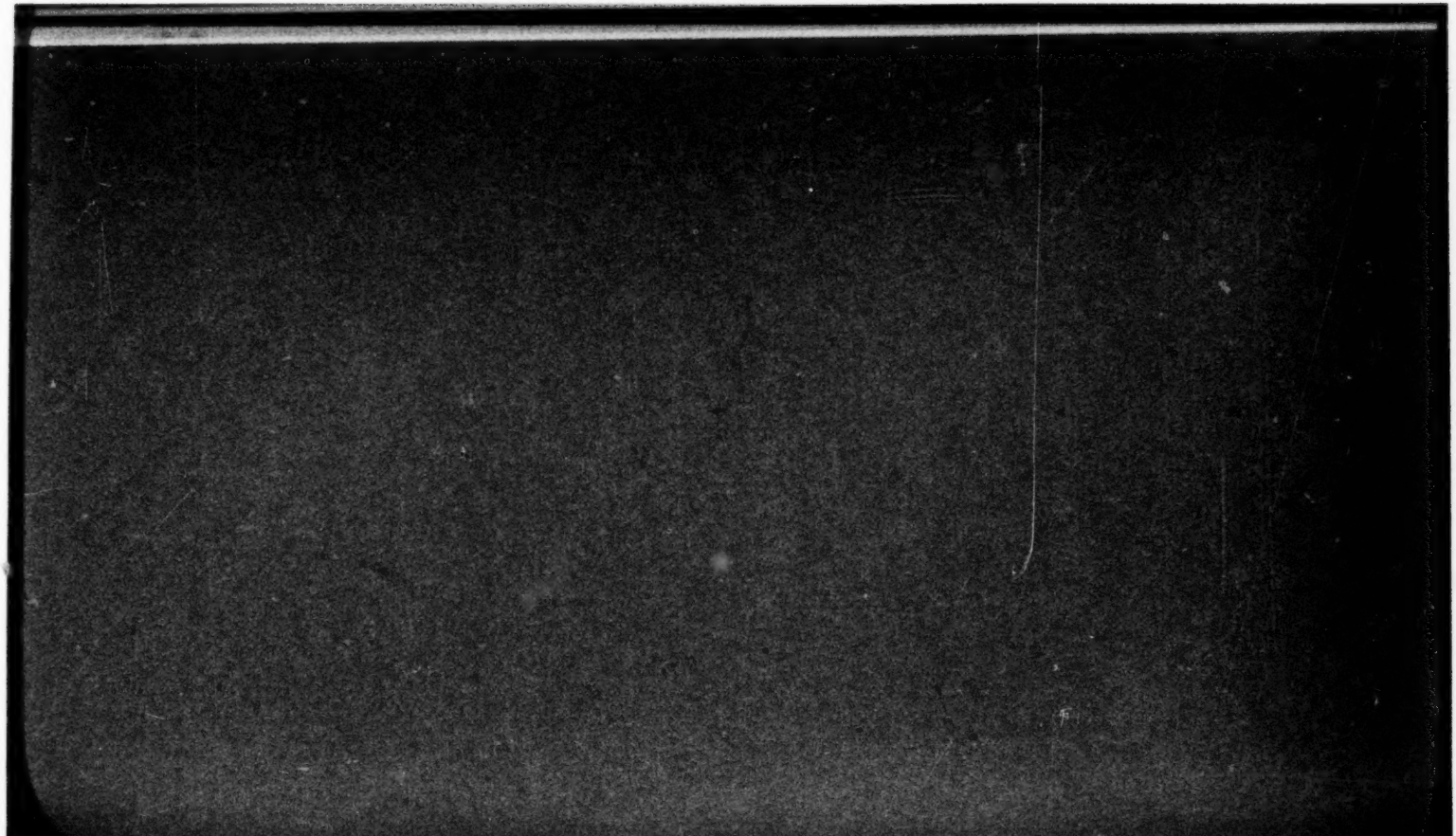
(24,191)



(25,191)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 416.

ARMOUR & COMPANY, PLAINTIFF IN ERROR,

vs.

THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

INDEX.

	Original.	Print
Petition for writ of error	*a*	1
Order allowing writ of error	*b*	1
Writ of error	*c*	1
Assignments of error	*e*	3
Bond on writ of error	*i*	5
Citation and service	*k*	6
Clerk's return to writ of error	*l*	6
Petition	1	7
Statement of the case	1	7
Assignments of error	3	9
Argument	4	9
Transcript of record from the circuit court of the city of Richmond	27	28
Injunction order, May 18, 1915	27	28
Bill of complaint	29	30
Exhibit No. 1—Interrogatory	34	34
Decree of July 9, 1915	35	37
Decree of July 30, 1915, appealed from	35	37

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 9, 1917.

	Original	Print
Amended bill	36	38
Answer	39	40
Commonwealth's Exhibit No. 1—Interrogatories of Merchant, &c.	43	43
Commonwealth's Exhibit No. 2—Letter, Moore to commissioners of revenue, May 19, 1915	44	47
Answer of Jos. B. Anderson, commissioner, *et als.*	45	48
Stipulation as to facts, &c.	50	51
Opinion of the court	50	52
Certificate of clerk	58	58
Opinion, Keith, P.	59	58
Judgment	73	67
Certificates to record	74	67

a In the Supreme Court of Appeals of Virginia, at Richmond.

No. 91.

ARMOUR & COMPANY, Plaintiff in Error,
vs.
THE COMMONWEALTH OF VIRGINIA, Defendant in Error.

Petition for a Writ of Error and Supersedeas.

Now comes Armour & Company, a corporation, complainant and plaintiff in error, in the above entitled cause, and conceiving itself aggrieved by a final decree made and entered therein by the Supreme Court of Appeals of Virginia on the 13th day of January, 1916, reversing the decree of the Circuit Court of the City of Richmond, made and entered in the said cause on the 30th day of July, 1915, does hereby petition for a writ of error and supersedeas, filing herewith its assignments of error to the said decree of the said Supreme Court of Appeals of Virginia, to the Supreme Court of the United States, and prays that said writ of error and supersedeas may be granted and that a transcript of the record and proceedings herein may be duly authenticated and transmitted to the Supreme Court of the United States in the manner provided by law, and that an order may be entered fixing the amount of the appeal bond, said bond when approved to act as a supersedeas.

EPPA HUNTON, JR.,
H. T. HALL,
Attorneys for Armour & Company,
Plaintiff in Error.

b STATE OF VIRGINIA,
Supreme Court of Appeals, ss:

Let the writ of error issue upon the execution of a bond by Armour & Company to the Commonwealth of Virginia in the amount of Ten Thousand Dollars ($10,000.00), said bond when approved to act as a supersedeas.

JAMES KEITH,
President (Chief Justice) of the Supreme Court of Appeals of Virginia.

Richmond, Va., February 29, 1916.

c THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of Appeals of Virginia, Greeting:

Because in the record of proceedings as also in the rendition of the judgment, of a plea which is in the said Supreme Court of Ap-

peals of Virginia, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Armour & Company, plaintiff-in-error, and the Commonwealth of Virginia, defendant-in-error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute or of an authority exercised under the said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such, their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission a manifest error hath happened to the great damage of the said Armour & Company as by its complaint appears, we being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under year seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States together with this writ, so that you have the same in the said Supreme Court at the City of Washington, District of Columbia, on the 1st day of April, 1916, to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court of the United States the 8th day of March, in the year of our Lord One Thousand Nine Hundred and Sixteen.

[United States District Court, Eastern District of Virginia.]

JOSEPH P. BRADY,
Clerk of the District Court of the United States for the Eastern District of Virginia.

Allowed by
JAMES KEITH,
President, Supreme Court of Appeals of Virginia.

[Endorsed:] Received & filed Mch. 8, 1916. H. Stewart Jones, Clerk.

e In the Supreme Court of Appeals of Virginia, at Richmond.

No. 91.

ARMOUR & COMPANY, Plaintiff in Error,
vs.
THE COMMONWEALTH OF VIRGINIA, Defendant in Error.

Assignments of Error.

Now comes Armour & Company, the above named plaintiff in error, having filed herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States, makes the following assignments of error:

I.

That the Supreme Court of Appeals of Virginia erred in holding and deciding in this cause that a certain Act of the General Assembly of the Commonwealth of Virginia, approved March 19, 1915, as follows:

"Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this state to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this state as merchandise, shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares, and merchandise manufactured by them. To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue, for the district for which he was licensed, showing purchases as above defined, and also goods, wares and merchandise manufactured and sold or offered for sale in this
f State during the preceding twelve months; except such goods, wares and merchandise as *is* manufactured by persons, firms and corporations taxed on their capital by this State."

was valid and constitutional, and not in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

Plaintiff in error avers that the holding and decision of the said Supreme Court of Appeals of Virginia to this effect was in violation of said Article I, Section 8, Clause 3 of the Constitution of the United States, for the reason that the said Act is unconstitutional as being an interference with interstate commerce and also an attempted regulation thereof.

II.

That the Supreme Court of Appeals of Virginia erred in holding and deciding in this cause that the said Act was valid and constitutional and not in violation of Article IV, Section 2, of the Constitution of the United States.

Plaintiff in error avers that the holding and decision of the said Supreme Court of Appeals of Virginia to this effect was in violation of said Article IV, Section 2, of the Constitution of the United States, for the reason that the said Act is unconstitutional as attempting to deprive Armour & Company, a citizen of a State other than Virginia, of the privileges and immunities of the citizens of the State of Virginia, which privileges and immunities are guaranteed to the said Armour & Company by said Article IV, Section 2, of the Constitution of the United States.

III.

That the Supreme Court of Appeals of Virginia was in error in holding and deciding in this cause that the above mentioned
g Act of the General Assembly of the Commonwealth of Virginia is valid and constitutional, and not in violation of Article XIV, Section 1, of the Constitution of the United States, being a certain Article in addition to and amendment of the Constitution of the United States, proposed by Congress and ratified by the legislatures of the several States pursuant to the fifth article of the original Constitution.

Plaintiff in error avers that the holding and decision of the said Supreme Court of Appeals of Virginia to this effect was in violation of said Article XIV, Section 1, of the Constitution of the United States, for the reason that the said Act is unconstitutional as attempting to abridge privileges and immunities of Armour & Company, a citizen of the United States, and as attempting to deny it as a person within the jurisdiction of the United States, the equal protection of the laws, which said privileges and immunities, and said equal protection of the laws are guaranteed to it by said Article XIV, Section 1, of the Constitution of the United States.

The particular sections or clauses of said above mentioned Act of the General Assembly of the Commonwealth of Virginia rendering the same unconstitutional, and rendering the same in violation of the said Article I, Section 8, Clause 3, and Article IV, Section 2, and Article XIV, Section 1, of the said Constitution of the United States, referred to in the foregoing assignments of error, are the following:

"Provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them.'

h and the last clause thereof:

"except such goods, wares, and merchandise as *is* manufactured by persons, firms and corporations taxed on their capital by this State."

For which said errors Armour & Company, the above named plaintiff in error, prays that the said decree and judgment of the Supreme Court of Appeals of Virginia, dated the 13th day of January, 1916, shall be reversed and annulled, and that the decree and judgment shall be rendered in favor of the plaintiff in error, and for costs.

EPPA HUNTON, JR.,
H. T. HALL,
Attorneys for Armour & Company,
Plaintiff in Error.

i

Copy.

In the Supreme Court of Appeals of Virginia, at Richmond.

#91.

ARMOUR & COMPANY, Plaintiff-in-error,
vs.
THE COMMONWEALTH OF VIRGINIA, Defendant-in-error.

Appeal Bond.

Know all men by these presents, that we, Armour & Company, as principal, and the National Surety Company as surety, are held and firmly bound unto the Commonwealth of Virginia in the sum of Ten Thousand Dollars ($—,000.00), to be paid to the said Commonwealth of Virginia, to which payment well and truly to be made we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 4th of March 1916.

Whereas the above named plaintiff-in-error seeks to prosecute its writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the Supreme Court of Appeals of Virginia:

Now, therefore, the condition of this application is such that if the above named plaintiff-in-error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

ARMOUR & COMPANY,
By ANDREW D. CHRISTIAN.
Att'y in Fact.

(Insert officers' names.)

Attest:

—— ——, *Secretary.*

j

NATIONAL SURETY COMPANY,
By ARTHUR M. CANNON.
CHAS. P. BIGGER.

(Insert officers' names.)

Attest:

LILLIE V. HAINANT,
Res. Ass't Secretary.

Approved M'ch 6/1916.
JAMES KEITH,
President (Chief Justice) of the
Supreme Court of Appeals of Virginia.

[Endorsed:] Bond Received & filed M'ch 6/1916.

k *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Commonwealth of Virginia, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Appeals of the State of Virginia, at Richmond, Virginia, wherein you are plaintiff in error and Armour & Company is defendant in error, to show cause, if any there be, why the judgment rendered against the said defendant in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the President of the Supreme Court of Appeals of the State of Virginia, this 15 day of March, 1916.

JAMES KEITH,
President Supreme Court of Appeals of Virginia.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

Attest:
H. STEWART JONES,
Clerk Supreme Court of Appeals of
Virginia, at Richmond, Virginia.

RICHMOND, VIRGINIA, March 15th, 1916.

I, Jno. Garland Pollard, attorney of record for the plaintiff in error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

JNO. GARLAND POLLARD,
Attorney for the Commonwealth of Virginia.

l *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Appeals of Virginia, ss:

In obedience to the commands of the above writ, I hereby transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I have hereunto subscribed my name, and affix the seal of the said Supreme Court of Appeals of Virginia, in the City of Richmond, this March 15th, 1916.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,
Clerk Supreme Court of Appeals of Virginia, at Richmond, Virginia.

Counsel for plaintiff in error, Eppa Hunton, Jr., H. T. Hall. For the Commonwealth, Attorney General, John Garland Pollard.

1 In the Supreme Court of Appeals of Virginia, at Richmond.

COMMONWEALTH OF VIRGINIA
v.
ARMOUR & CO., a Corporation.

To the Honorable Judges of the Supreme Court of Appeals of Virginia:

Your petitioner, the Commonwealth of Virginia, respectfully represents that it is aggrieved by a final decree of the Circuit Court of the City of Richmond, entered on the 30th day of July, 1915, in a certain suit pending in the said court under the style of Armour & Co. v. Commonwealth of Virginia and others, wherein Armour & Co. was complainant and your petitioner, the Commonwealth of Virginia, C. Lee Moore, auditor of public accounts, and various commissioners of the revenue for various cities and counties were defendants.

A transcript of the record in said case is herewith presented as a part of this petition.

Statement of the Case.

Armour & Co., a corporation, filed its bill of complaint in the Circuit Court of the City of Richmond against the Commonwealth of Virginia, C. Lee Moore, auditor of public accounts, and various commissioners of the revenue for various cities and counties of the State of Virginia, representing that it was a non-resident corporation, duly licensed to do business in the State of Virginia; that it was engaged in the manufacturing business, with packing houses located in various cities outside of the State of Virginia; that it had established at various points in Virginia branch or distributing
2 houses to which its manufactured products were sent to be sold; and that the commissioners of the revenue of the various cities and counties wherein its branch or distributing houses were located were proceeding to assess said Armour & Co. with a merchant's State license tax, under section 45 of the Tax Bill as amended by Acts of 1915, chapter 148, page 233; that said Armour & Co. was selling at its various distributing houses in

Virginia certain articles of merchandise not manufactured by it and was required to take out a merchant's license for each of its branch distributing houses in order to handle articles not manufactured by it; and that the commissioners of revenue were proceeding to assess the complainant pursuant to instructions from the auditor of public accounts, and to require it to return as purchases, not only goods, wares and merchandise purchased from other houses, but also the goods, wares and merchandise manufactured by said Armour & Co.; and it was alleged that said section 45 of the Tax Bill, as amended, operated to discriminate in favor of resident manufacturers and to impose upon non-resident manufacturers a burden of taxation in order to dispose of their products in Virginia which was not imposed upon resident manufacturers, who, it was alleged, were expressly exempted under section 47 of the Tax Bill from the payment of a merchant's tax; and that section 45 of the Tax Bill was an interference with interstate commerce and a violation of the commerce clause of the Federal Constitution, and, therefore, unconstitutional and void; and that it was further in violation of other provisions of the Federal Constitution; and it was further alleged that the interrogatories prepared by the auditor of public accounts demonstrated the discriminatory character of the act in question; and that the necessary effect of the enforcement of the said act was to discriminate against non-resident manufacturers by requiring them to pay a license tax on their sales in Virginia, and by not requiring resident manufacturers to pay a like merchant's tax on their sales in Virginia.

A preliminary injunction was granted in accordance with the prayer of the bill, and at the final hearing of the cause, the court allowed the complainant to file an amended bill alleging that section 45 of the Tax Bill, as amended, was inconsistent with the provisions of section 47; and that these statutes being contradictory, it was impossible to obtain therefrom the legislative intent.

At the hearing the Commonwealth of Virginia and C. Lee Moore, auditor of public accounts, filed their joint and several answers, setting out the new interrogatories prepared by the auditor of
3 public accounts and filing as an exhibit therewith the instructions of the auditor of public accounts sent to the commissioners of the revenue, dated May 19, 1915, and giving his construction of sections 45 and 46 of the Tax Bill, as amended, and denying that section 45 of the Tax Bill, as amended, operated to discriminate in favor of resident manufacturers and to impose upon non-resident manufacturers a burden not imposed upon resident manufacturers; and further denying that resident manufacturers were expressly exempted under section 47 of the Tax Bill from the payment of a merchant's license tax, but alleging that sections 45, 46 and 47 of the Tax Bill, as amended, required both resident and non-resident manufacturers offering for sale at any place or store other than the place of manufacture goods, wares and merchandise manufactured by them, to report in writing under oath to the commissioner of the revenue such goods, wares and merchandise manufactured and sold, or offered for sale, at any other place than the

place of manufacture; and further alleging that both resident and non-resident manufacturers so offering their goods for sale at any other place than the place of manufacture were required to pay a license tax graduated by the amount of purchases made during the period for which the license was granted, and that such purchase should include goods, wares and merchandise so manufactured by them and offered by them for sale at a place other than the place of manufacture; and denying further that the provisions of the Tax Bill constituted an interference with interstate commerce or a violation of any other provision of the Federal Constitution. The various commissioners of the revenue filed their joint and several answers, adopting the answer of the auditor of public accounts.

At the hearing, after argument by counsel, the court entered an order perpetuating the injunction, upon the ground that section 45 of the Tax Bill, as amended, was unconstitutional, being in violation of the interstate commerce clause of the Constitution. (Record, p. 13.)

In a written opinion, made a part of the record by the court in this case, the court gives its reasons in full for the action taken in perpetuating the injunction. (Record, p. 31.)

Assignments of Error.

The Commonwealth contends that the decree perpetuating the injunction is erroneous, because section 45, as amended, when rightly construed, is not in violation of the commerce clause of the Federal Constitution.

4 *Argument.*

This case is the sequel to the case of Morris & Co. v. Commonwealth, 116 Va. 912, where the court had under consideration the construction of sections 45 and 46 of the Tax Bill as they stood prior to the recent amendment. In that case, Morris & Co., a non-resident corporation, operated packing houses at Chicago and other cities where it purchased live stock, slaughtered the same and from their carcasses manufactured and prepared for sale various food products. It disposed of its products through distributing houses at various points, one of these being in the City of Roanoke, Virginia, where it applied for a merchant's license under sections 45 and 46 of the Tax Bill. In making return of its purchases, it returned only about $20,000.00 as the amount actually purchased from other companies, and refused to return the amount of $40,000.00, the value of products manufactured at its own packing houses and sold through its branch in Roanoke, Virginia. Having been indicted and found guilty of fraudulently procuring its license to do business as a merchant in violation of section 45 of the Tax Bill, Morris & Co. appealed to this court, which reversed the lower court, holding that when the goods were sent from the central packing house to its branch distributing houses, such transaction could not be denominated a

purchase within the meaning of the Tax Law, and that the company was not required to return as purchases goods which were sent from its own packing house to its own distributing houses in Roanoke and other places in Virginia. While the case of Morris & Co. was being considered by the Supreme Court of Appeals, the Legislature, by act approved March 25, 1914, amended section 45 of the Tax Bill in practically the same form in which it now stands. See Acts of 1914, chap. 280, p. 488. And again, by act approved March 19, 1915, section 45 was amended. See Acts of 1915, chap. 148, p. 233, reading as follows:

"45. Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State, to be graduated by the amount of purchases made by him during the period for which the license is granted, *and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State, as merchandise, shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them.* To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue, for the district for which he was licensed, showing *purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months; except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this state.* The form of the report required by this section shall be prepared by the auditor of public accounts and furnished to each commissioner of the revenue, and by him distributed to each licensed merchant; and each commissioner shall, in the mode prescribed for making such report by him of the violations of the revenue law, report every merchant who shall fail to comply with the requirements of this section. Any person violating the provisions of this section shall pay a fine of not less than thirty dollars, or more than one thousand dollars for each offense."

A careful reading of the amendment, especially the portions underscored above, which contain the parts of the statute amended, will show that the object and purpose of the amendment was to meet the contention made by the manufacturers establishing stores for the sale of their own products at a place other than the place of manufacture, to-wit, that they could not be required to return as purchases goods brought from their places of manufacture and offered for sale at such stores.

A comparison of the law as it stood prior to amendment with the amended statute will show clearly the intention of the Legislature. See section 45 of the Tax Bill, Va. Code 1904, p. 2220, and said section as amended and quoted above. As the law originally stood, it simply required a license tax of a merchant to be graduated

by the amount of purchase made by him during the period for which his license was granted. As amended, the law amplifies and defines the meaning of purchases as follows:

"And all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this State, as merchandise, shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for
6 sale *at the place of manufacture*, goods, wares and merchandise manufactured by them." (Italics ours.)

The statute, as originally drawn, did not define purchases except in so far as it required the merchant to make report in writing to the commissioner of the revenue, "showing the amount of goods actually bought by him during the next preceding twelve months." In lieu of this language, the amended statute requires the merchant to make report to the commissioner of the revenue, showing purchases as above defined, and also, all goods, wares and merchandise manufactured and sold or offered for sale in the State during the next preceding twelve months; except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State."

Remembering, therefore, the contention of the Commonwealth in Morris & Co. v. Commonwealth, supra, it seems clear that the Legislature intended by its amendment to section 45 to require a merchant who was also a manufacturer to return as purchases goods manufactured by him and sold at his store which was at a place in Virginia other than the place of manufacture; but it is equally clear that the object of the law was to allow manufacturers in Virginia to sell at the place of manufacture without taking out a merchant's license. This is the construction put upon this statute by the auditor of public accounts in his letter to commissioners of the revenue, filed with the Commonwealth's answer. This letter may be found on p. 24 of the record, and reads as follows:

"I address you this communication to call your especial attention to the fact that, under sections 45 and 46 of the Tax Laws, as amended by the act approved March 19, 1915, all manufacturers who engage in this State in the business of a merchant at a place other than the place of manufacture are required to take out merchants' licenses; and this requirement applies not only to non-resident manufacturers who establish a store or place of sale in this State, but it also applies to resident manufacturers who open a place for the sale of their goods other than the place of manufacture.

"A manufacturer engaged in business in this State who is taxed upon the capital employed in the business may, without a merchant's license, sell at the place of manufacture, but nowhere else, except by sample, the goods, wares and merchandise manufactured by him, and a non-resident manufacturer, establishing a place of manufacture in this State, and taxed by this State on his capital employed
7 in that business, would have the same privilege. If either a non-resident manufacturer or a resident manufacturer desires to sell the goods, wares and merchandise manufactured by him at a

definite place or store other than the place of manufacture, then such manufacturer, either resident or non-resident, must, as aforesaid, take out a merchant's license even though this definite place or store be located in the same city or town in which his place of manufacture is established.

"When a manufacturer establishes a place or store for the sale of his goods other than at his place of manufacture, the State merchant's license tax required by sections 45 and 46 of the Tax Laws is graded according to his purchases, and all goods, wares and merchandise manufactured by such merchant and sold, or offered for sale, at a place other than his place of manufacture shall be considered as purchases. In other words, both the resident and non-resident manufacturer who establishes a store or place of sale other than the place of manufacture is required to take out a State merchant's license, and the amount of the State license tax is to be graded not only by the amount of the purchases made by such manufacturer from other manufacturers, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale; and he is required to report to the commissioner not only the amount of goods purchased by him from other manufacturers and offered for sale, but also the amount of the goods manufactured by him either within or without this State and offered for sale by him at his store or definite place in this State other than the place of manufacture.

"The provisions of sections 45 and 46 are to be enforced alike with respect to manufacturers in this State and manufacturers out of this State who engaged in this State in the business of merchants elsewhere than at the place of manufacture.

"The sections place them upon the same footing and the law should be administered alike to each."

It was contended below that the construction of the auditor of public accounts, set out above, was contrary to the commerce clause of the Federal Constitution, because a resident manufacturer could sell at his place of manufacture in Virginia his goods without taking out a merchant's license, and that this privilege was a discrimination against non-resident manufacturers, even though both resident and non-resident manufacturers, in establishing a place for the sale of their goods other than the place of manufacture, were re-
8 quired to take out a merchant's license therefor and to return as purchases goods shipped from the place of manufacture for sale at such store.

It was also contended below that section 45 as amended, was so contrary to the terms of section 47 of the Tax Bill that it was impossible to ascertain the legislative intent; and, therefore, a manufacturer should not be required to return as purchases goods shipped by him from his place of manufacture to be sold at a place other than the place of manufacture.

The court below, in its opinion made a part of the record, took a different position from the contention of the complainant below and held in effect that section 47, being re-enacted in the same statute which amended section 45 (see Acts 1915, ch. 148, pp. 233 and

236), by its very terms allowed a manufacturer in Virginia to sell anywhere in Virginia its manufactured articles without taking out a merchant's license therefor; and that, therefore, section 45, when construed to require a non-resident manufacturing corporation, establishing a store in Virginia, to return as purchases goods shipped into Virginia from its place of manufacture, was unconstitutional, being discriminatory in character and contrary to the commerce clause of the Federal Constitution. We will treat each of these questions in their order.

1.

Section 45 of the tax bill, as amended, when construed to require both non-resident and resident manufacturers to return as purchases goods manufactured by them and offered for sale at a place other than the place of manufacture, makes no discrimination between non-resident and resident manufacturers, and is not contrary to the commerce clause of the Federal Constitution.

The object of sections 45 and 46 of the Tax Bill, as amended, is to classify and grade merchants for the purpose of taxation, and the basis of classification adopted is the amount of purchases. Where the purchases do not exceed $1,000.00, the amount of the fee required is $5.00; where they exceed $1,000.00 and do not exceed $2,000.00, the amount is $10.00; for all purchases over $2,000.00 and less than $100,000.00, the fee is twenty cents on the hundred dollars, and upon all purchases over $100,000.00, the fee is
9 ten cents on every hundred dollars in excess of $100,000.00.

Now, it is perfectly clear, as we shall show hereafter, that the law does not make any distinction between resident and non-resident merchants; nor does it make any distinction on account of the place where the purchases are made, whether from home manufacturers or from non-resident manufacturers; nor does it make any distinction between a merchant who is a manufacturer in Virginia and a merchant who is a manufacturer outside of Virginia and establishes a place of business for the sale of his goods in Virginia. The sole basis of the complaint, as presented in the oral argument below, was not against sections 45 and 46 of the Tax Bill, but against other portions and the general policy of the Tax Laws of Virginia, read in connection with said sections 45 and 46, which exonerate manufacturers who are taxed on their capital from paying a license tax for the sale of their goods at their place of manufacture, it being claimed that this privilege of selling at the place of manufacture without a merchant's license is discriminatory.

Under the system of taxation in Virginia, when a manufacturing company pays a tax on its capital, such company is not required to take out a license for the sale of its goods at its place of manufacture. On the other hand, by the terms of section 46, it is provided that the license taxes required by that section shall be "in lieu of all taxes for State purposes on the capital actually employed by said merchant, or mercantile firm or corporation in said business. * * *" In other words, the tax paid by the manufacturer on his capital gives

him the privilege of selling at his place of manufacture goods so manufactured by him; but, if he wishes to establish a store for the sale of his goods other than the place of manufacture, he must take out a merchant's license, and this provision is applicable not only to manufacturers in Virginia, but also to manufacturers out of Virginia. The discrimination complained of is that the resident manufacturer may sell at his place of manufacture without taking out a merchant's license, but that the non-resident manufacturer, not having a place of manufacture in Virginia, cannot sell at all without taking out his merchant's license. It is respectfully submitted that the law makes no discrimination. A non-resident manufacturer does not pay a tax upon his capital in Virginia, because he does not have his place of manufacture in Virginia. This is a difference and not a discrimination.

A very similar question came before the Supreme Court of the United States in the case of New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323. In that case, a statute of New York was construed which required every corporation organized under the law of New York or any other State or country, and doing business in New York, except certain companies, including manufacturing corporations wholly engaged in carrying on manufacture within the State of New York, to pay into the State treasury annually a tax upon its business based upon the amount of the capital stock actually employed within the State. Parke, Davis & Co., the appellant in that case, was a corporation organized under the laws of the State of Michigan for the manufacture and sale of chemical and pharmaceutical preparations. Its factory was situated in the City of Detroit. The corporation established a warehouse and depot in the City of New York and there kept on hand varying quantities of its manufactured products, which *which* were there sold at wholesale in original packages. The company paid an annual rental of $12,500.00 for its place of business in New York, and employed fifty persons in its New York branch, and for the years 1890 to 1894, inclusive, expended for said branch from $102,000.00 to $172,000.00. The average stock of goods sent from Michigan and carried in New York was $50,000.00. It also employed in New York during said years a continuing capital of from $23,000.00 to $62,000.00, used in the purchase and sale of crude drugs. Upon this state of facts, the comptroller of New York imposed for 1894 and five previous years an annual tax based upon the sum of $90,000.00 as capital employed within the State. Parke, Davis & Co. filed a petition before the Supreme Court of New York praying for a writ of certiorari directed against the comptroller in order to correct the assessment, alleging that, as said company was a manufacturing corporation, it was exempted from taxation under the laws of the State of New York, and that the comptroller erred in deciding that goods manufactured by said corporation and stored in its depot in New York was capital employed in said State within the meaning of said statute; and that if said statute was correctly interpreted by the comptroller, then said statute was unconstitutional and void as in contravention of the Constitution of the United States and

amendmens thereto. By successive appeals, the case was brought to the Supreme Court of the United States.

After holding that the construction put upon the statute by the State of New York was binding upon the Supreme Court of the United States, the court took up the contention that the corporation, being a Michigan corporation and having complied with the provisions of the law for transacting business within the State of New York, was denied the equal protection of the law when sub-
11 jected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within that State, and that such a tax was an unjust discrimination against this Michigan corporation whose place of manufacture was in the State of Michigan. On this point, the court said:

"By this contention it is not meant, of course, that this particular corporation is, in terms, discriminated against in the New York statute, but that all corporations which manufacture their goods wholly in other states and send them for sale in New York are discriminated against in favor of such corporations, whether foreign or domestic, as manufacture their goods within the state of New York.

"To sustain this contention the well-known line of cases is cited, wherein this court has had to deal with state legislation imposing discriminatory taxes against the products of other states. Walling v. Michigan, 116 U. S. 446; Robbins v. Shelby County Taxing Dist., 120 U. S. 489; Minnesota v. Barber, 136 U. S. 313.

"If the object of the law in question was to impose a tax upon products of other states while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the states. But we think that, obviously, such is not the purpose of this legislation. 'Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this state or in any other state or country and doing business in this state * * * * shall be liable to and shall pay a tax as a tax upon its franchises or business into the state treasury annually, to be computed as follows.'

"It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacturing or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other states as well, wholly engaged in manufacturing within the state.

"In construing this statute it was held in the case of People, Blackington & Co. v. Roberts, 4 App. Div. 388, that a New York corporation which carried on a manufacturing business in another state was liable to this tax; and this decision was affirmed by the New York Court of Appeals. 151 N. Y. 652.

12 "The tax is graded according to annual dividends, and originally was assessed upon the entire capital of a corpora-

tion; but the statute was amended in 1885 so as to read: 'The amount of capital stock which shall be the basis for tax under the provisions of section three, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State.'

"So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other states to the detriment of the latter, or to subject property out of the state to taxation."

In Plummer v. Coler, 178 U. S. 115, 132, 44 L. Ed. 999, at p. 1007, the court, in considering the case of New York v. Roberts, supra, used the following language:

"In New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323, an effort was made to have a tax imposed against corporations based upon 'capital employed within the state' declared invalid, in that particular case, because a portion of such capital consisted of imported goods in original packages; and this court said:

"'Again, it is said that, even assuming that the importation of crude drugs and their sale in the original package constituted a portion of the corporate business, no tax could be imposed by the state under the doctrine of Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested.'"

Again, in Southern Railway Co. v. Greene, 216 U. S. 400, at p. 415, 54 L. Ed. 536, at p. 540, the court said:

"In New York v. Roberts, 171 U. S. 652, 43 L. Ed. 323, a tax was imposed upon the franchises or business of corporations, with certain exceptions, computed upon the amount of capital stock employed within the state. It was pointed out by Mr. Justice
13 Shiras, who delivered the opinion of the court, that the tax was imposed as well for New York corporations as those of other states, and he said: 'So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other states, to the detriment of the latter, or to subject property out of the state to taxation.'"

In Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. Ed. 269, the Reymann Brewing Company, a corporation of the State of West Virginia, with its principal office in the City of Wheeling, filed its bill of complaint in the Circuit Court of the United States for the Southern District of Ohio against Harry Brister, the treasurer of the County of Jefferson, State of Ohio, seeking to restrain and enjoin the said treasurer from retaining the possession of certain personal property belonging to the brewing company, which he had seized in enforcing what was known as the Dow Tax Law of the

State of Ohio. Under the terms of the law, it was provided that "upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors there shall be assessed annually, and paid into the county treasury as hereinafter provided, by every person, corporation or partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or partnership, the sum of three hundred and fifty dollars." It was alleged by the complainant, whose property had been seized to enforce the payment of the assessment, that the statute was void because it discriminated in favor of the manufacturers and brewers of beer who had their plants located within the State of Ohio as against those who had their plants located in other states, and because it constituted in its practical operation a regulation of commerce between the states. On this point the court, speaking through Mr. Justice Shiras, said, p. 451, 45 L. Ed. 273:

"So far as the terms of the statute are concerned, they do not disclose any intention to discriminate between foreign and domestic dealers in intoxicating liquors, as the tax in question is to be assessed upon every person, corporation or co-partnership engaged in the business of trafficking in such liquors. But it is contended that the effect of the legislation necessarily results in such a discrimination, because of the provisions of the 8th section of the statute, which is in the following words:

" 'The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but *such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same* in quantities of one gallon or more at any one time.' (Italics ours.)

"The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture without being subjected to the tax, and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities not less than one gallon at any one time, such a provision operates as an illegal discrimination against the foreign competitor, who must necessarily sell at places other than the place of manufacture.

"Under this provision, the manufacturers, whether within or without the state, may sell at the manufactory and ship to any part of the state of Ohio, and the incidental disadvantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the state of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention

on the part of the state legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another state it would be subjected to the tax if it sold intoxicating liquor at a place within the state of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax.

"A similar contention was disposed of by this court in New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323. In that case a corporation of the state of Michigan, and having its factory within that state, had a warehouse and store for the sale of its products in the City of New York. A statute of the state of New York enacted that 'every corporation, joint-stock company, or association whatever, now or hereafter incorporated, organized or formed under, by, or pursuant to law in this state, or in any other state or country and doing business in this state, except * * * manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this state * * * shall be liable to and shall pay a tax as a tax upon its franchise or business into the state treasury annually,' and that 'the amount of capital stock which shall be the basis for tax * * * in the case of every corporation, joint-stock company and association, liable to taxation thereunder shall be the amount of capital stock employed within the state.'

"It was claimed that the Michigan corporation, having come within the jurisdiction of New York by compliance with all provisions of law imposing conditions for transacting business within the state, was denied the equal protection of the law when subjected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within the state, and that such a tax was an unjust discrimination against the corporation, whose place of manufacture was in the state of Michigan. But this court held otherwise, saying:

" 'If the object of the law in question was to impose a tax upon products of other states, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to effect or regulate commerce between the states. But we think that obviously such is not the purpose of this legislation. * * * It will be perceived that the tax is prescribed as well for New York corporations as for those of other states. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the state of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other states as well, when wholly engaged in manufacturing within the state.'

"So, in the present case, the exemption is not confined to Ohio corporations or copartnerships, but extends as well to foreign corporations whose place of manufacturing is within the state of Ohio; and so, likewise, the tax is imposed on Ohio corporations which

manufacture goods in other states, and establish places for their sales within the State of Ohio, or which, manufacturing within the state, establish places within the state distinct from the manufactory, where their liquors are sold and delivered."

Thus it will be seen that in the case last cited, the law of Ohio specifically exonerated a manufacturer from paying a retail tax and allowed him to sell at his place of manufacture without taking out a retail license, and yet the court held that since the exemption was not confined to Ohio corporations or copartnerships, but extended to other corporations whose place of manufacture was within the State of Ohio, and since the tax was imposed upon Ohio corporations manufacturing their goods in other states, and establishing places for their sale within the State of Ohio, or which, manufacturing within the state, established places within the state distinct from the manufactory, where the liquors were sold and delivered, the law was not contrary to the Federal Constitution.

16

It will be noted that the law in the case at bar has the same force and effect as the Ohio law. It is not confined to Virginia corporations, but it extends to foreign corporations whose place of manufacture is within the State of Virginia. So, likewise the tax is imposed upon Virginia corporations which manufacture their goods in other states and establish places for their sale in the State of Virginia, or which manufacture within this state and establish places within this state distinct from their manufacture, where their goods are sold and delivered.

It is respectfully submitted that the case of Reymann Brewing Co. v. Brister, supra, and the case of New York v. Roberts, supra, are on all fours with the case at bar, and should control the court in its decision of this point.

This case is clearly distinguished from Ward v. Maryland, 12 Wall. 418, 429, 20 L. Ed. 449, 452, where the court held unconstitutional a statute of Maryland making it a penal offense for any person "not being a permanent resident of that State" to sell, offer or expose for sale in the City of Baltimore any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in the State of Maryland, without obtaining a license for the purpose. The ground for the invalidity of said statute was that it discriminated against the property and products of people of other states. It is submitted that no such ground can be found in the statute herein. The statute is applicable to resident merchants as well as non-resident merchants, and requires a merchant to return as purchases not only goods bought from without the state, but also goods bought from within the state, and the statute does not exempt a manufacturer from paying the tax, whether resident or non-resident, when he establishes a store for the sale of his goods. The effect of the statute is simply to recognize that manufacturers who have paid a tax upon their capital should have the privilege, without paying any further tax, to sell at the place of manufacture.

So, likewise, the case at bar should be distinguished from Welton v. Missouri, 91 U. S. 279, 23 L. Ed. 347, 349, where the court de-

17 clared invalid a statute of Missouri providing that whoever should deal in the selling of patent and other medicines, goods, wares and merchandise, except books, charts, maps and stationery, which were "not the growth, produce or manufacture of this State," by going from place to place to sell the same, should be deemed a peddler, and prohibiting him, under a penalty, from dealing as such without obtaining a license; but which did not require a license of persons going from place to place and selling the produce or manufacture of the state. It is clear that, in that case, there was a discrimination between goods which were the produce and manufacture of the State of Missouri and those which were the produce and manufacture of other states. But, in the case at bar, a merchant is required to return as purchases all of his goods, whether of the produce or manufacture of the State of Virginia or of other states; and it is to be noted that the tax provided for by the statute is in lieu of a tax upon his capital. In other words, Virginia has adopted this method of grading merchants in order to derive a just license tax from them, and the tax provided for is a tax in lieu of capital. On the other hand, manufacturers are not taxed in the same method as merchants, but are taxed upon their capital. When a person or corporation in Virginia engages in manufacturing and also establishes a store separate from his place of manufacture, he is treated by the laws of the State of Virginia both as a manufacturer and as a merchant. He is required to pay a tax upon his capital as a manufacturer and he takes out a license as a merchant. There can be no injustice, discrimination or complaint made because the laws of Virginia require the same person to pay different kinds of taxes for different kinds of occupations, and so long as the law is applicable alike to resident and non-resident merchants and resident and non-resident manufacturers there would seem to be no just ground for the claim that the law is discriminatory. On the other hand, if a non-resident manufacturer is not required to return his purchases for graduation as a merchant, then non-resident manufacturers might come into the State of Virginia and open stores all over Virginia for the sale of their products without paying any merchant's license tax therefor, thus gaining a distinct advantage over the resident merchants. As was said by the Supreme Court of the United States in Horne Silver Mining Co. v. New York, 143 U. S. 305, 315, 36 L. Ed. 164, 168, 'it does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

18 The case at bar is easily distinguishable from Webber v. Virginia, 103 U. S. 344, 350, 26 L. ed. 565, 567, the case upon which the court below based its decision. In that case, sections 45 and 46 of the tax laws, as they then existed, were so applied as to require an agent for the sale of articles manufactured in other States to obtain a license to sell such articles in each county in which he offered to sell them, while an agent for the sale of articles manufactured in this State was not required to obtain a license to pay any license tax if he was acting for the manufacturer. The court held that the tax demanded was made to depend upon

the foreign character of the goods, that is upon their having been manufactured without the State, and, therefore, to that extent, was a regulation of commerce in the articles between the States. It cannot be said in the case at bar that the question as to whether the tax shall be imposed in a particular case depends upon the foreign character of the articles. Armour & Company is required to return as its purchases all the goods brought by it to its store for sale, whether said goods were produced in Virginia or out of Virginia. The foreign character of the articles offered for sale has nothing to do with the question of the tax in this case. So, also, Rountree & Company, a Virginia corporation, manufacturing in Richmond, Virginia, trunks and satchels, when it establishes a store on Broad Street, and apart from its manufactory, is required, under the law as it now stands, to return as purchases at its store all goods brought to such store, and offered for sale there, from other manufacturers or from its own factory; and it is plainly to be seen that there is no distinction in the law whether the corporation in this case is a non-resident corporation, nor does the statute make any distinction on account of the foreign character of the articles produced and offered for sale.

II.

Sections 45 and 47 of the tax bill, as amended, are not so contradictory as to make it impossible to ascertain the intention of the Legislature, but said sections may be reconciled and both given effect.

It is proper to remark here that section 47 was twice amended by the acts of 1915. See acts 1915, ch. 103, p. 139, which was approved March 15, 1915, and acts 1915, ch. 148, p. 236, which was approved March 19, 1915. These two amendments are identical in language, except those portions of chapter 103 quoted below which will be underscored. Chapter 103, p. 139, reads as follows:

"Every railroad company or other incorporated company
19 in this Commonwealth, whether such privilege be granted in its charter or not, which shall sell any mineral or forest product, or any other article, shall be taxed as other merchants dealing in like commodities. This act shall apply to companies keeping commissaries, or having agents for the sale of any other article than their own product; provided, that nothing herein contained shall prevent a railroad company from buying and distributing to its employes, as part of their compensation, meat, meal and flour, at the cost price thereof; but nothing in the foregoing shall be construed as requiring a company selling the products of their own mines, or lands, or manufacturers, to pay a merchant's license for so doing, *except as otherwise provided by law with reference to the licensing of merchants by the State.*

"Any railroad company or other incorporated company selling any article or products on account of the owner, and receiving a compensation therefor other than for transportation, storage or handling, as provided in its charter, shall pay a license the same as commission merchants. It shall be the duty of the commissioner of

the revenue to ascertain the liability of such individuals or companies in this State to the payment of such license taxes, and shall assess the same in the same manner as other merchants."

It is obvious, from the language underscored above, that draftsman of this amendment was conscious of the fact that the merchants' license law contained a provision in regard to manufacturers, whereas when chapter 148 was drafted, section 47 was inserted therein without amendment. As the latter chapter, however, contains amendment to section 45, the result is the same whether we take the law as written in chapter 103, or as written in chapter 148, that is to say, either statute must, if possible, be construed so as not to conflict with the express provisions of section 45.

It is a well known and elementary principle of statutory construction that, in order to determine the true intention of the Legislature, the particular clauses and phrases should not be studied as detached and isolated expressions, but the whole and every part of the statute must be considered in fixing the meaning of any of its parts. Black on Interpretation of Laws (2nd ed.), ch. 8, p. 317, et seq. And it is a further general principle that that construction of the statute is to be favored, and must be adopted, if reasonably possible, which will give meaning to every word, clause and sentence of the statute, and operation and effect to every part and provision of it. Willis v. Kalmbach, 109 Va. 475, 481; Smith v. Bryan, 100 Va. 199;
20 Hoover v. Saunders, 104 Va. 783. So if there are apparent conflicts or repugnances between different parts or provisions of the statute, it must be considered as a whole in the light of its general purpose and intention, and the court must endeavor to avoid such conflicts, and reconcile such repugnances, by adopting an interpretation which will harmonize all of the provisions of the law, if this can be done reasonably and without too great violence to the language of the act.

It is equally clear that if two parts or sections of the same statute are not absolutely irreconcilable, it is the duty of the court, if possible, to give effect to both and to avoid an interpretation of one portion of a statute which will neutralize another portion thereof. Black on Interpretation of Laws (2nd ed.), pp. 324 and 325.

We have already seen that the purpose of section 45, as amended, was to require merchants to take out a merchant's license, to be graded according to their purchases; and, second, to require merchants in applying for a license to return as purchases all property brought to their stores for sale, including goods manufactured at another establishment by such merchants.

Examining the provisions of section 47 above, it seems to be aimed especially at railroads selling mineral or forest products, but its terms are broadened so as to include other incorporated companies, and especially companies keeping commissaries. Then it is provided that nothing in said section shall prevent a railroad company from buying and distributing to its employes, as a part of their compensation, provisions at the cost price thereof, and then follows the proviso, in which we are interested, to the following effect:

"Nothing in the foregoing shall be construed as requiring a com-

pany selling the products of their own mines, lands or manufacturers to pay a merchant's license for so doing."

Now this language as applicable to manufacturers is not clear, nor explicit in its meaning. The court below, however, construes this language as giving manufacturers in this State the power to sell anywhere in this State their manufactured products without procuring a license therefor. It is submitted that the statute should not be so construed.

First. The plain terms of the statute limit it to the provision of section 47, "nothing in the foregoing." This language plainly means nothing in the foregoing part of this section shall be
21 construed as requiring a manufacturer to pay a merchant's license tax "for so doing," whatever this may mean. But, even if we consider this language to mean to pay a merchant's license tax for selling the products of its own manufacture, it is plain that such language should not be allowed to override the plain provisions of section 45, as amended, which require every person or corporation engaged in the business of a merchant to pay a license tax for the privilege of doing business in this State, to be graduated according to his purchases; and further requires that goods, wares and merchandise manufactured by such merchant, and sold or offered for sale in this State, shall be considered as purchases. Even if we concede that chapter 103 is not law, which we do not concede, section 47 as contained in chapter 148, acts 1915, should not be construed to override the express provisions of section 45 contained in the same chapter. Both sections should be read so as to give full force and effect to the provisions of each so far as possible. So, the language in chapter 47 with reference to manufacturers should be construed as provided for in section 45, to-wit: "Nothing in the foregoing shall be construed as requiring manufacturers to pay a merchant's tax for selling the products of their manufacture at the place of manufacture." But, even if this be denied, it is clear that where one section uses the language "nothing in the foregoing shall be construed" in a certain way, this does not prevent an entirely different section from expressly providing the law on that subject.

III.

Sections 45, 46 and 47 of the tax bill as amended should be construed together, and so construed require both non-resident and resident manufacturers, establishing a place for the sale of their goods other than the place of manufacture, to take out a merchants' license therefor, and the construction put by the court below upon section 47, nullifying and making nugatory the provisions of section 45, is erroneous.

In the opinion of the court below, made a part of the record, the court first examined the history of section 45 and analyzed the case of Morris & Co. v. Commonwealth, 116 Va. 912. After this examination the court says (Record p. 36):

"From the history of the above amendment it would seem that

the draughtsman intended to reach the non-resident manufacturer and meet the decision of the Morris case."

22 It must be borne in mind that the Morris case had no reference to the question of the invalidity of the statute under the commerce clause. In other words the contention of the Commonwealth in the Morris case applied equally both to resident and non-resident manufacturers and simply was aimed at the definition of the word "purchases" as used in the original statute, and no question of distinction between residents and non-residents was raised. In the second place nowhere in the statute as amended does the word resident or non-resident appear, nor does the statute mention goods produced in this State or goods produced out of the State. On the contrary, the first sentence of section 45 is general and applicable to all merchants, to-wit:

"Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State to be graduated by the amount of purchases made by him during the period for which his license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State as merchandise shall be considered as purchases within the meaning of this section, provided that this section shall not be construed as applying to manufacturers taxed on capital by this State who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them."

Analyzing the above statute it is to be observed, first, that it is applicable to all persons or corporations engaged in the business of a merchant, whether they be resident or non-resident; second, any such person or corporation engaged in the business of a merchant is required to return as purchases all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State as merchandise. Surely there is no hint of a distinction here between goods manufactured in this State and goods manufactured out of this State. The statute says "all goods manufactured by such merchant," and nothing could be more inclusive than the language here used. The proviso that "this section shall not be construed as manufacturers taxed on capital by this State who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them," is applicable both to resident and non-resident manufacturers; for it is a matter of common knowledge that non-residents (both persons and corporations) are constantly establishing places of manufacture in this State, and when they do so they are

23 required to pay a tax upon their capital used in such manufacturing business. The proviso, therefore, is applicable both to resident and non-resident manufacturers and only exempts a manufacturer from taking out a merchants' license tax when he offers his goods for sale at the place of manufacture. By the express terms of the statute, therefore, if a manufacturer, either resident or non-resident, offers to sell his goods, wares and merchandise manufactured by him at a place other than the place of manufacture, the preceding provisions of the section are applicable to him, namely: He must return as purchases the goods, wares and merchandise man-

ufactured by him and offered for sale at such a store, being other than the place of manufacture. The only language in the amended statute which lends any color whatever, it is respectfully submitted, to the position taken by the court below in its opinion is contained in the proviso of the second sentence of section 45. Said sentence reads as follows:

"To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing under oath to the commissioner of the revenue for the district for which he was licensed, showing purchases *as above defined*, and all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months; *except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State.*" (Italics ours.)

If we take the literal meaning of the above proviso the statute would exempt a merchant from returning as purchases any goods, wares or merchandise manufactured by persons, firms and corporations taxed on their capital by this State. But this literal meaning taken without reference to any other provision in the statute is not only ridiculous in its effect, but also clearly discriminatory, and all that a merchant would have to do, if this literal meaning should be adopted, would be to purchase goods manufactured in this State and escape taxation entirely. But it was conceded below that no such construction should be put upon the statute and no such claim was made. Evidently the proviso must be read with reference to the definition of purchases referred to above, and the whole statute taken together shows that the proviso has reference to goods, wares and merchandise manufactured by persons, firms and corporations taxed on their capital by this State and offered for sale at the place
24 of manufacture. By adopting this construction, which is not at all forced, every word, sentence and phrase in the statute is given a meaning. In addition such a construction prevents the statute from being unconstitutional, and carries out the evident purpose of the Legislature to require merchants, whether resident or nonresident, to return as purchases goods manufactured by them and offered for sale at a store other than the place of manufacture. But so careful was the Legislature to protect manufacturers who offer for sale their goods at the place of manufacture, that it was thought wise to make the insertion of such a proviso in the merchant's statute. It is respectfully submitted that the meaning of the statute is plain; that the intention of the Legislature is clear and that the construction here taken avoids the difficulty of having the statute declared unconstitutional.

Next, let us examine the provisions of section 47 upon which the court below seems to base its opinion. As we have seen before, section 47 was twice amended by the Legislature of 1915, first in chapter 103, p. 139, next in chapter 148, p. 236. As we have already seen above the only difference between the two amendments is that the first statute(chapter 103) contains the clause italicized in the section above, to-wit:

"But nothing in the foregoing shall be construed as requiring companies selling the products of their own mines or lands or manufacturers to pay a merchant's license for so doing, *except as otherwise provided by law with reference to the licensing of merchants by the State.*"

In our view of the law it makes no difference whether the italicized clause be a part of the statute or not, but we respectfully submit that it is not contradictory in terms to the amendment of section 45 as contained in chapter 148, and that both statutes can stand. But whether they can stand or not it is respectfully submitted that the language "nothing in the foregoing" is applicable only to section 47, and surely when a statute simply says that nothing in the foregoing part of this statute shall require a manufacture- to pay a merchant's license tax, such language should not be allowed to supersede, override, and render nugatory the plain and express language of section 45, which provides in effect that when a manufacturer establishes a store for the sale of his goods other than the place of manufacture he must pay a merchant's license tax. These two sections (45 and 47) are a part of the same chapter of acts of 1915, and it is respectfully submitted that the court below in construing section 47 as giving to resident manufacturers
25 the right to sell their products at other places in this State without the taking out of a merchant's license tax was imparting a strength and virtue to one sentence of section 47 which left out of view all the provisions of section 45, and violated those canons of construction which require that an act must be construed as a whole so as to give effect to every part of the same, if possible, and to carry out the obvious intention of the lawmakers.

It is to be noted that the proviso of section 47 is not intended to limit the whole of the tax bill. Each section of the tax bill is an independent section and the proviso in section 47 is not intended to limit all the prior provisions of the statute. The proviso here is appended to what may be called the commissary section of the statute, the object of which is to require companies having commissaries to pay a merchant's license tax therefor. Now it is obvious that the proviso to such a section should not be allowed to override the plain provisions of section 45, one of the objects of which, as amended, is to require manufacturers who establish a place of business for the sale of their goods other than the place of manufacture to take out a merchant's license therefor.

In this connection we desire to direct the attention of the court to the amendment of sections 8 and 9 of the tax bill as found in chapter 70, acts 1915, page 98. By an examination of said chapter 70 it will be found that it is the policy of the law of the State of Virginia to tax the capital of individuals and corporations as capital if it be "not otherwise taxed," and by the amendment aforesaid this policy is extended to nonresidents, both individuals and corporations; for in the last sentence of section 9 it is provided as follows:

"The provisions of this section of this schedule shall apply with equal force to any person or corporation representing in this State business interests that may claim a domicile elsewhere, the intent

and purpose being that no non-resident person or corporation, either personally or through any agent, shall transact business here without paying to the State a corresponding tax with that exacted of its own citizens and all bills receivable, obligations or credits and other intangible assets arising from the business done in this State are hereby declared assessable within this State and at the business domicile of said non-resident person or corporation, his or its agent or representative."

It has been seen before that the merchant's license tax required by sections 45 and 46 was declared by the law to be "in
26 lieu of all taxes for State purposes on the capital actually employed by said merchant or mercantile firm or corporation in said business." If a manufacturer engage in the business of a merchant at a place of business other than its place of manufacture and claim that he is exempt under the law from returning goods shipped from his place of manufacture to his store as purchases, then, evidently, it is the policy of the law of the State of Virginia that he shall be taxed upon that part of his capital employed in his business as a merchant which has not been otherwise taxed. In other words, manufacturers going into the mercantile business should either be required to be graded for their merchant's fees by returning all of their goods used at their stores, or if they by any chance should escape from the necessity of returning their goods shipped from their place of manufacture to their stores, then the law is clear that they should be taxed on the capital employed in this part of their business, since such capital is not otherwise taxed.

In conclusion there are certain general principles applicable to the construction of statutes to which we desire to direct the attention of the court. Every act of the Legislature is presumed to be valid and constitutional until the contrary is shown; all doubts are to be resolved in favor of the validity of the act and if it is clearly and reasonably open to more than one construction, that construction would be adopted which will reconcile the statute with the Constitution and avoid the consequences of unconstitutionality. Martin v. South Salem Land Co., 97 Va. 349, 353; Adams Express Co. v. Charlottesville Woolen Mills Co., 109 Va. 1; Harrison v. Thomas, 103 Va. 333, 336; Singer Sewing Machine Co. v. Brickell, 233 U. S. 304, 58 L. ed. 974; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586; Pullman Co. v. Kansas, 216 U. S. 56, 54 L. ed. 378.

As an example of how far the Supreme Court of the United States will go in upholding the construction put by a State court upon a State statute in order to avoid violation of the Federal Constitution we may cite Howe Machine Co. v. Gage, 100 U. S. 676, 25 L. ed. 754. In that case the Howe Machine Company manufactured sewing machines in Connecticut and sent an agent into Sumner County, Tennessee, for the purpose of peddling these machines. The agent traveled through the county in a wagon exhibiting and offering for sale the company's machines, selling the identical machines which he had with him on his wagon. The statute under

which he was tried provided that all articles manufactured
27 as a product of the State were exempt from tax and another provision required that all peddlers of sewing machines should pay a tax of $15.00. The Supreme Court of Tennessee held that the latter provision levied a tax upon all peddlers of sewing machines without regard to the place of growth or production of the material or manufacture and the Supreme Court of the United States held that it considered itself bound to regard the construction put upon the statute by the State as correct and to give it the same effect as if it were a part of the statute, and therefore sustained the Supreme Court of Tennessee in upholding the judgment of the lower court finding the agent guilty of peddling without a license.

For these reasons it is respectfully submitted that the decree of the Circuit Court of the City of Richmond in perpetuating the injunction was erroneous and should be reviewed and reversed.

Respectfully submitted.

COMMONWEALTH OF VIRGINIA,
By JNO. GARLAND POLLARD,
Attorney-General of Virginia.
CHRISTOPHER B. GARNETT,
Assistant Attorney-General.

R. H. C.

August 11, 1915.

Appeal and supersedeas. No bond required.

R. H. CALDWELL.

To the Clerk of the Supreme Court of Appeals, Richmond, Va.:

Received August 18, 1915.

H. S. J.

VIRGINIA:

Pleas before the Circuit Court of the City of Richmond, held in the court room of said city, in the City Hall thereof, on Friday, the 30th day of July, 1915.

Be it remembered, that heretofore, to-wit, on Tuesday, the 18th day of May, 1915, the following order was entered:

28 ARMOUR & COMPANY, a Corporation Organized under the Laws of the State of New Jersey, Complainant,

against

COMMONWEALTH OF VIRGINIA, C. LEE MOORE, Auditor of Public Accounts; Joseph B. Anderson, Commissioner of the Revenue for the City of Danville, Virginia; D. R. Hunt, Commissioner of the Revenue of the City of Roanoke, Virginia; William H. Snead, Commissioner of the Revenue of the City of Lynchburg; Chas. H. Callahan, Commissioner of the Revenue of the City of Alexandria; D. W. Fowler, Commissioner of the Revenue for the City of Charlottesville; Henry E. Tresnon, Commissioner of the Revenue of the City of Richmond; R. L. Cosby, Commissioner of the Revenue for the City of Newport News; E. J. Doran, Commissioner of the Revenue for the City of Norfolk; F. A. Heatwole, Commissioner of the Revenue for the Central District of Rockingham County, and W. H. Fletcher, Commissioner of the Revenue for the Western District of Wise County, Defendants.

Upon the application of Armour & Company, a non-resident corporation, an injunction is hereby awarded enjoining and restraining C. Lee Moore, Auditor of Public Accounts; Jos. B. Anderson, Commissioner of the Revenue for the City of Danville; D. R. Hunt, Commissioner of the Revenue for the City of Roanoke; William H. Snead, Commissioner of the Revenue for the City of Lynchburg; Chas. H. Callahan, Commissioner of the Revenue for the City of Alexandria; D. W. Fowler, Commissioner for the City of Charlottesville; Henry E. Tresnon, Commissioner of the Revenue for the City of Richmond; R. L. Cosby, Commissioner of the Revenue for the City of Newport News; E. J. Doran, Commissioner of the Revenue for the City of Norfolk; F. A. Heatwole, Commissioner of the Revenue for the Central District of Rockingham County; and W. H. Fletcher, Commissioner of the Revenue for the Western District of Wise County, Virginia, from requiring Armour & Company to include as purchases the goods, wares and merchandise manufactured by it outside of Virginia, and brought or shipped therein for sale in its application for a merchant's license to do business in the respective cities and counties of said commissioners of the revenue. This injunction order shall continue effective until the 10th day of July, 1915, and after the expiration of that time, shall stand dissolved unless previously enlarged by an order of this court.

29 This injunction, however, shall not take effect until Armour & Company or some one for it, shall enter into bond before the clerk of this court in the penalty of $7,500.00, with surety satisfactory to the clerk of this court, conditioned to pay all such costs as may be awarded against it and all such damages as may be incurred in case the injunction shall be dissolved.

And at another day, to-wit: At rules held in the clerk's office of the Circuit Court of the City of Richmond on the first Monday in July, 1915. This day came the plaintiff by its attorneys and

filed its bill and exhibit, which bill and exhibit are in the words and figures following, to-wit:

Bill.

In the Circuit Court for the City of Richmond, Virginia.

ARMOUR & COMPANY
v.
COMMONWEALTH OF VIRGINIA, C. LEE MOORE, Auditor of Public Accounts, and Others.

Bill in Equity.

To the Hon. R. Carter Scott, Judge of the Circuit Court for the City of Richmond, Virginia:

Your complainant, Armour & Company, a corporation organized under the laws of the State of New Jersey, would respectfully show to the court the following statement of facts:

(1) That your complainant is a non-resident corporation, duly licensed and qualified to do business in the State of Virginia by having qualified to do business in Virginia by obtaining a certificate of authority to do business in Virginia and by paying the annual registration fees, in accordance with the statute in such cases made and provided.

(2) That your complainant is engaged in the manufacturing business; that it has packing houses located at Chicago, Ill., Kansas City, Mo., Omaha, Nebraska, Fort Worth, Texas, and Sioux City, Iowa, and that it has grape juice factories at Mattewan, Michigan, Westfield, N. Y., and Ridgley, Maryland; that at its various packing houses, its business consists in slaughtering animals and in preparing the carcases for use and sale; that the blood, hair, heads, hoofs, horns, etc., are all prepared for sale as articles of commerce; that the other parts of the carcases fit for human food are manufactured into fresh meats, sausage, head-cheese, mincemeats, canned
30 meats, bacon, smoked meats, boiled and baked hams; baked pork and beans, oleomargarine, lard and other products. Every part of the slaughtered carcases is manufactured into some useful article of commerce, and in the manufacture of these articles of commerce much labor and complicated machinery are employed at the various stages from the time the animals are slaughtered until the process of manufacture is complete, and the products are in condition to *the* placed on the market for sale. The products above enumerated are manufactured from live stock purchased on foot at the various points where its packing houses are located; that, at its grape juice factories above enumerated, grape juice is manufactured from grapes purchased on the market. Your complainant alleges that the business it is engaged in is peculiarly a manufacturing business.

(3) Your complainant would further show to the court that for the purpose of disposing of its manufactured products, which are

produced at its various manufacturing plants, as hereinbefore set forth, it has established at various points in Virginia branch or distributing houses to which its manufactured products are sent to be placed on the market for sale; that it has such distributing houses in the City of Danville, the City of Lynchburg, the City of Roanoke, the City of Alexandria, the City of Charlottesville, the City of Richmond, the City of Newport News, the City of Norfolk, the Town of Harrisonburg, Rockingham County, and the Town of Norton, Wise County; that the commissioners of the revenue of the cities and counties aforesaid, under instructions from C. Lee Moore, auditor of public accounts, are proceeding to assess your complainant with a merchant's State license tax, pursuant to and in accordance with section 45 of the tax bill of the State of Virginia, which act was approved on March 19, 1915, which said act provides as follows:

"Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this State, as merchandise, shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place
31 of manufacture, goods, wares and merchandise manufactured by them."

That said commissioners of the revenue are proceeding to assess your complainant in accordance with said act pursuant to instructions from C. Lee Moore, Auditor of Public Accounts, will more fully appear from the form of application prepared by said auditor under which the commissioners are required to propound to each applicant for a merchant's license the following interrogatory:

"What amount of goods, wares and merchandise were bought by you during each of the following named months (including goods, wares and merchandise manufactured by you outside of Virginia, brought or shipped therein for sale by you at — (Virginia); viz: (then follows a list of the months covered by the license period, with blanks for amounts following each month)."

A copy of said form of application for a merchant's license for the year, 1915, as prepared by C. Lee Moore, auditor of public accounts, is herewith filed as Exhibit No. 1, and prayed to be read as a part hereof.

(4) Your complainant alleges that at its various distributing houses in Virginia, and elsewhere, it offers for sale and sells certain articles of merchandise not manufactured by it, and that it is required to take out a merchant's license for each of its branch distributing houses in order to handle these articles of merchandise which it sells and which are not manufactured by it.

(5) Your complainant further alleges that said section 45 of the tax bill, approved March 19, 1915, operates to discriminate in favor of resident manufacturers, and to impose upon non-resident manufacturers a burden of taxation in order to dispose of their products

in Virginia, which is not imposed upon the resident manufacturers, who are expressly exempted under section 47 of said tax bill from the payment of a merchant's license tax; that said provision of the Virginia Tax Bill is an interference with interstate commerce and violates article 1, section 8, clause 3 (the commerce clause) of the Federal Constitution and is, therefore, unconstitutional and void; that it further violates the Federal Constitution in that such legislation is prohibited by article 4, section 2, of said Constitution, which guarantees equal privileges and immunities to the citizens of
32 the several States and further violates article 14, section 1, of said Constitution, which prohibits any State from making and enforcing laws which abridge the privileges or immunities of citizens of the United States and guarantees the equal protection of the laws. The interrogatory propounded to applicants for a merchant's license requiring the applicant to include as purchases all goods, wares and merchandise, manufactured by them outside of Virginia, clearly demonstrates the discriminatory character of the act in question, and your complainant alleges that the necessary effect of the enforcement of said act is to discriminate against non-resident manufacturers by requiring them to pay a merchant's license tax on their sales in Virginia, and by not requiring resident manufacturers to pay a like merchant's tax on their sales in Virginia, and renders said act unconstitutional and void under the decisions of the Supreme Court of Appeals of Virginia, and under the decisions of the Supreme Court of the United States.

(6) Your complainant would further show to the court that, on account of the fact that at its various distributing branch houses in Virginia it sells articles of merchandise not manufactured by it; that it is required at each of its said branch houses to take out a merchant's license, and that it is ready and willing to take out a merchant's license on the basis of its actual purchases for said branch houses, but that the said commissioners of the revenue at the places above named, under instructions from C. Lee Moore, auditor of public accounts, are attempting to assess your complainant with a merchant's license tax pursuant to said act by including the value of the products of its own manufacture in the purchases which it is required to give in as the basis for issuing a merchant's license tax.

(7) Your complainant further alleges that if it is required to take out the merchant's license under said unconstitutional and void statute, that in order to recover the license tax paid by it, it will be necessary for it to institute proceedings in the various cities and counties in which it his distributing houses located, and it is advised that the remedy by injunction against the assessment of said tax will avoid a multiplicity of suits.

Your complainant, being entitled to relief in a Court of Equity from the assessment of taxes which the said commissioners are attempting to make against it, pursuant to said unconstitutional and void statute, prays that the Commonwealth of Virginia, C.
33 Lee Moore, auditor of public accounts; Jos. B. Anderson, commissioner of the revenue for the City of Danville, Virginia; D. R. Hunt, commissioner of the revenue for the City of Roanoke,

Virginia; William H. Snead, commissioner of the revenue for the City of Lynchburg; Chas. H. Callahan, commissioner of the revenue for the City of Alexandria; D. W. Fowler, commissioner of the revenue for the City of Charlottesville; Henry E. Tresnon, commissioner of the revenue for the city of Richmond; R. L. Cosby, commissioner of the revenue for the City of Newport News; E. J. Doran, commissioner of the revenue for the City of Norfolk; F. A. Heatwole, commissioner of the revenue for the central district of Rockingham County; and W. H. Fletcher, commissioner of the revenue for the western district of Wise County, may be made parties defendant to this bill and required to answer the same, answer under oath being hereby waived; that the court will declare said section 45 of the tax bill, approved March 19, 1915, unconstitutional and void, as being discriminatory against your complainant, and that an injunction may be granted restraining the said auditor of public accounts and the said commissioners of the revenue from proceeding to assess a merchant's license tax against your complainant in accordance with the terms and provisions of said act on its manufactured products, and that your complainant may be granted such other, further and general relief in the premises as the nature of its case may require and as to equity may seem meet, and it will ever pray, etc.

ARMOUR & COMPANY,
By COUNSEL.

HALL, WOODS & COXE, *p. q.*

STATE OF VIRGINIA,
City of Richmond, To wit:

This day C. S. Nelson, personally appeared before me, and being by me first duly sworn, made oath that the facts stated in the foregoing bill of complaint are true to the best of his knowledge, information and belief.

Given under my hand this 18th day of May, 1915.

C. S. NELSON.

Subscribed and sworn to before me this 18th day of May, 1915.

F. H. OVERBY,
Notary Public.

My commission expires the 30th day of April, 1919.

COMMONWEALTH
v.
ARMOUR & Co.

EXHIBIT No. 1.

A. P. A. 178—4—8—15—35M.

Virginia.

This blank form prepared and furnished by the Auditor of Public Accounts for procuring sworn answers to interrogatories propounded a Merchant applying for State license. This blank form and none other must be used for this purpose.

C. LEE MOORE,
Auditor Public Accounts.

1915.

Interrogatories of Merchant Applying for State License.

VIRGINIA,
County (or City) of.....

.....191

I, ..., do make oath upon the Holy Bible (or New Testament) (or do affirm because I object to making oath on the Holy Bible or New Testament) that the answers to the interrogatories which follow are true, full, perfect and correct to the best of my knowledge and belief, and they are based upon the most reliable information I have or could have from books, invoices and other papers, records and sources relating to my business as a merchant.

.....
Merchant sign here (see note below).

.....
Place of business.

Subscribed and sworn to before me this..... day of..... 191

.....
Commissioner of the Revenue, or Duly Qualified Deputy.

Interrogatories.

Is this your first year in business as a Merchant?
Answer .....

How many years have you been in business as a Merchant?
Answer .....

Has your business increased or decreased?
Answer .....

What annual rent do you pay for the premises used by you as a Merchant?
Answer .....

If you own the premises what is the annual rental value?
Answer .....

How many assistants, clerks and other employees employed?
Answer .....

What is the average annual cost of such employment?
Answer .....

Do you keep any written record or account of your purchases?
Answer .....

If you do, did the Commissioner of the Revenue ask to examine such record or account?
Answer .....

Did you show the Commissioner of the Revenue such record or account?
Answer .....

If you keep no such record or account, how did you calculate the detailed list of purchases here reported?
Answer .....
.....
.....

What amount of goods, wares and merchandise were bought by you during each of the following named months (including goods, wares and merchandise manufactured by you outside of Virginia, brought or shipped therein for sale by you at....., Virginia): viz:

During the month of April, 1914.....	$.....
During the month of May, 1914.....	.....
During the month of June, 1914.....	.....
During the month of July, 1914.....	.....
During the month of August, 1914.....	.....
During the month of September, 1914	.....
During the month of October, 1914.....	.....
During the month of November, 1914	.....
During the month of December, 1914..	.....
During the month of January, 1915.....	.....
During the month of February, 1915....	.....
During the month of March, 1915.....	.....
Total	$.....

I, ..., Commissioner of the Revenue (or duly qualified deputy), do certify the Merchant who subscribed to these interrogatories made oath thereto before me on the Holy Bible (or New Testament) (or affirmed thereto because he objected to making oath upon the Holy Bible or New Testament).

Witness my hand this..... day of 191

.....

Commissioner of the Revenue, or Duly Qualified Deputy.

Amount of purchases added by Examiner of Records.....$.....
State Tax on amount added by Examiner of Records.....$.....
Amount of purchases added (or reduced) by Local Board of Review .....$.....
State Tax on amount added (or reduced) by Local Board of Review .....$.....

VIRGINIA,

County (or City) of.....

Office of the Local Board of Review, ..., Virginia.

The foregoing statement by the Local Board of Review is hereby certified to be correct.

LOCAL BOARD OF REVIEW,

By .....,

Chairman (or Acting Chairman.)

Dated 191

Notes.

If the Merchant is an individual, interrogatories to be signed and sworn to by him or her.

If the Merchant is a partnership, interrogatories to be signed and sworn to by one of the partners.

If the Merchant is a company or corporation, interrogatories to be signed and sworn to by the officer having the best and most reliable information from which to answer the interrogatories.

The Commissioner of the Revenue should deliver these interrogatories, with list of Merchants doing business in his district, to the Examiner of Records, who will receive them and examine into their correctness, and then refer them, with the list of Merchants and his report, to the Local Board of Review for further review and correction. The interrogatories and list should be retained in the office of the Board and the Board should make an original list of the Merchants showing amount of purchases on which State License Tax is charged and the amount of State License Tax to be paid by each Merchant, which original list it shall retain in its office. Copy of this list should be sent the Commissioner of the Revenue, the County or City Treasurer, as the case may be, and the Auditor of Public Accounts. The Auditor of Public Accounts will supply blank forms on which to make these lists.

35 And at another day, to-wit: At a Circuit Court of the City of Richmond, held in the court room of said city in the City Hall thereof, on Friday, the 9th day of July 1915.

This day came the parties by counsel, and upon application of Armour & Co. it is adjudged and ordered and decreed, that the injunction hitherto awarded on the 18th day of May, 1915, upon the application of Armour & Co., a non-resident corporation, restraining C. Lee Moore, auditor of public accounts; Joseph B. Anderson, commissioner of the revenue for the City of Danville; D. R. Hunt, commissioner of the revenue for the City of Roanoke; William H. Snead, commissioner of the revenue for the City of Lynchburg; Charles H. Callahan, commissioner of the revenue for the City of Alexandria; D. W. Fowler, commissioner of the revenue for the City of Charlottesville; Henry E. Tresnon, commissioner of the revenue for the City of Richmond; H. L. Cosby, commissioner of the revenue for the City of Newport News; E. J. Doran, commissioner of the revenue for the City of Norfolk; F. A. Heatwole, commissioner of the revenue for the Central District of Rockingham County, and W. H. Fletcher, commissioner of the revenue for the Western District of Wise County, Virginia, from requiring Armour & Co., to include as purchases the goods, wares and merchandise manufactured by it outside of Virginia and brought or shipped therein for sale in its application for a merchant's license to do business in the respective cities and counties of said commissioners of the revenue, which said injunction order it was provided shall continue effective until the 10th day of July, 1915, and after the expiration of that time shall stand dissolved unless previously enlarged by an order of this court, shall be continued until the future order of this court.

And now at this day, to-wit: At a Circuit Court of the City of Richmond, held in the court room of said city in the City Hall thereof, on Friday the 30th day of July, 1915, being the day and year first herein written.

This cause is, by consent of parties by their counsel, docketed, and the defendants this day, by leave of court, filed their answers to the original bill, to which the complainant replied generally, and the complainant, by leave of court, filed its amended bill.

Thereupon this cause came on this day to be heard upon the original and amended bills of the complainant, the answers
36 of the defendants to the original bill, the general replications to said answers, the motion of the complainant to perpetuate the injunction hitherto granted in this cause, the motion of the defendants to dissolve the injunction hitherto granted in this cause, notice of which said motions was waived by respective counsel for complainant and defendants, and upon the agreed stipulation of facts, this day filed by leave of court, and was argued by counsel.

On consideration whereof, and for reasons stated in writing by the court, and made a part of the record, the court doth adjudge, order and decree that the injunction hitherto awarded in this cause on the 18th day of May, 1915, and which, by decree entered herein

Public Accounts. The Auditor of Public Accounts will supply blank forms on which to make these lists.

on the 9th day of July, 1915, was continued until the future order of this court, be and the same is hereby perpetuated.

And this decree is final.

Amended Bill.

Circuit Court for the City of Richmond, Virginia.

ARMOUR & Co.

v.

COMMONWEALTH OF VIRGINIA, C. LEE MOORE, Auditor of Public Accounts, and Others.

Amended Bill.

To the Honorable R. Carter Scott, Judge of the Circuit Court of the City of Richmond, Virginia:

Your complainant, Armour & Co., a corporation organized under the laws of the State of New Jersey, respectfully represents that on the 18th day of May, 1915, it presented to the judge of this court its original bill of complaint against the Commonwealth of Virginia, C. Lee Moore, auditor of public accounts, and others, wherein it alleged that section 45 of the Tax Bill, as amended by an Act approved March 19, 1915, was unconstitutional and void because it discriminates against non-resident manufacturers, in that it requires them in response to interrogatories to report as purchases articles manufactured by them, as a basis for issuing a merchant's license to them, and permits resident manufacturers to make sales of their manufactured products at the place of manufacture without obtaining a merchant's license, based on the value of their manu-
37 factured products.

That on the 18th day of May, 1915, an injunction was awarded, in accordance with the prayer of said bill of complaint, enjoining C. Lee Moore, auditor of public accounts, and the various commissioners of the revenue in the cities and counties in which the complainant has located distributing houses, from requiring the complainant to include as purchases the goods, wares and merchandise manufactured by it outside of Virginia, and brought or shipped therein for sale, in its application for a merchant's license to do business in the respective cities and counties of said commissioners of the revenue.

That on the 9th day of July, 1915, an order was entered enlarging and continuing said injunction order until the further order of the court.

Your complainant now desires to call attention to inconsistencies, to which attention is not called in the original bill, in the provisions of section 45 of said Tax Bill, and an inconsistency between section 45 and section 47 of the said Tax Bill, and is advised that it should amend its original bill and therefore now, by way of amendment, alleges that under the first clause of section 45 all goods, wares and

merchandise manufactured by such merchant and sold or offered for sale in this state as merchandise shall be considered as purchases within the meaning of this section, provided this section shall not be construed as applying to manufacturers taxed on capital by this state, who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them; and that under the second clause of said section, persons, firms and corporations taxed on their capital by this state are expressly exempted from the payment of a merchant's license tax for the privilege of selling the goods, wares and merchandise manufactured by them. That these contradictory provisions make it impossible to construe this section, so as to ascertain therefrom the legislative intent. That by virtue of the provisions of section 47 of the Tax Bill, as amended by an act approved March 19, 1915, it is expressly provided that a company selling the products of its own mines, lands or manufacturers shall not be required to pay a merchant's license tax for so doing. Your complainant is advised that under a proper construction of the provisions hereinbefore referred to of section 45 and section 47 of the Tax Bill, that a manufacturer, whether a resident or a non-resident, should not be required to take out a merchant's license, in order to
38 sell his manufactured products in Virginia, or to include in his application for a merchant's license the value of products manufactured by him and sold in Virginia.

Your complainant therefore prays that the Commonwealth of Virginia, C. Lee Moore, auditor of public accounts; Jos. B. Anderson, commissioner of the revenue for the city of Danville, Virginia; D. R. Hunt, commissioner of the revenue for the City of Roanoke, Virginia; William H. Snead, commissioner of the revenue for the City of Lynchburg; Chas. H. Callahan, commissioner of the revenue for the city of Alexandria; D. W. Fowler, commissioner of the revenue for the city of Charlottesville; Henry E. Tresnon, commissioner of the revenue for the City of Richmond; R. L. Cosby, commissioner of the revenue for the City of Newport News; E. J. Doran, commissioner of the revenue for the City of Norfolk; F. A. Heatwole, commissioner of the revenue for the Central District of Rockingham County, and W. H. Fletcher, commissioner of the revenue for the Western District of Wise County, may be made parties defendant to this amended bill and required to answer the same, answer under oath being hereby waived; that the provisions of section 45 and section 47 of the Tax Bill may be construed, and that your complainant be not required to include in its application for a merchant's license the value of the products manufactured by it and sold at its various distributing houses located in Virginia, in the cities and counties above mentioned, and that your complainant may be granted such other, further and general relief in the premises as the nature of its cause may require and as unto equity may seem meet, and your complainant will ever pray, etc.

ARMOUR & CO.,
H. T. HALL AND
EPPA HUNTON, JR., *Counsel.*

STATE OF VIRGINIA,
City of Richmond, To wit:

This day C. S. Nelson personally appeared before me, E. M. Rowelle, Clerk of the Circuit Court of the City of Richmond, in the State aforesaid, and made oath that the facts stated in the foregoing amended bill of complaint are true to the best of his knowledge, information and belief.

Given under my hand the 24th day of July, 1915,

E. M. ROWELLE, *Clerk.*

39 *Answer.*

VIRGINIA:

In the Circuit Court of the City of Richmond.

ARMOUR & CO.
v.
COMMONWEALTH OF VIRGINIA and Others.

Answer.

The joint and several answers of the Commonwealth of Virginia and C. Lee Moore, auditor of public accounts, to a bill of complaint against them and others in the Circuit Court of the City of Richmond by Armour & Co., a corporation, complainant.

These respondents, reserving to themselves the benefit of all just exceptions to the said bill, for answer thereto, or to so much thereof as they are advised that it is material for them to answer, answer and say:

(1) These respondents admit the allegations made in complainant's bill in paragraph (1).

(2) As to the allegations made in paragraph (2) of complainant's bill, these respondents are not advised and can neither admit nor deny the same.

(3) These respondents admit that the defendant has established at various points in Virginia branch or distributing houses, to which its products are sent to be placed on the market for sale; that it has such distributing houses in the City of Danville, City of Lynchburg, City of Roanoke, City of Alexandria, City of Charlottesville, City of Richmond, City of Newport News, City of Norfolk, town of Harrisonburg, Rockingham County, and town of Norton, Wise County; that the commissioners of the revenue of the cities and counties aforesaid, under instructions from respondent, C. Lee Moore, auditor of public accounts, are proceeding to assess complainant with a merchant's license pursuant to and in accordance with section 45 of the Tax Bill of the State of Virginia, as amended by chapter 148 of the Acts of 1915, p. 232, as alleged in paragraph (3) of complainant's bill; that said commissioners of the revenue are proceeding to assess

complainant pursuant to certain instructions from said C. Lee Moore, auditor of public accounts, and that the first instruc-
40 tions sent out by respondent, C. Lee Moore, auditor of public accounts, were in words and figures identical with Exhibit No. 1 filed by complainant with its bill and contained the interrogatory set out in paragraph (3) of complainant's bill; but these respondents would further show to the court that, after said instructions and form were prepared and sent out as aforesaid, respondent, C. Lee Moore, auditor of public accounts, prepared and sent out to the commissioners of the revenue a supplementary form superceding and taking the place of the aforesaid form, filed with complainant's bill as Exhibit No. 1, and that said supplementary form, superceding the first form, is filed with this answer, marked "Commonwealth's Exhibit No. 1," and prayed to be read as a part of this answer; that the interrogatory which would be applicable to the complainant, and which would be required to be propounded to complainant, in lieu of the interrogatory quoted in complainant's bill in paragraph (3), is as follows:

"What amount of goods, wares and merchandise were bought by you during each of the following months for sale at your place of business at —, Virginia, (including goods, wares and merchandise manufactured by you to be offered for sale at said place of business which is not the place of manufacture), viz.:" (Then follows a list of months covered by license period, with blanks for the amounts following each month).

These respondents would further show to the court that, on May 19, 1915, respondent, C. Lee Moore, auditor of public accounts, prepared and sent out special instructions to the commissioners of the revenue in the cities and counties of Virginia, calling their attention to the fact that, under sections 45 and 46 of the Tax Bill, as amended by act approved March 19, 1915, chapter 148, Acts of 1915, p. 232, all manufacturers who engage in this State in the business of a merchant at a place other than the place of manufacture are required to take out merchants' licenses; and that this requirement applied not only to non-resident manufacturers who establish a store or place of sale in this State, but that it also applies to resident manufacturers who open a place for the sale of their goods other than the place of manufacture. A copy of said letter, marked "Commonwealth's Exhibit No. 2," is herewith filed and prayed to be read as a part of this answer.

41 (4) These respondents admit the allegations of complainant's bill set out in paragraph (4).

(5) These respondents deny that said section 45 of the Tax Bill aforesaid operates to discriminate in favor of resident manufacturers and to impose upon non-resident manufacturers a burden of taxation in order to dispose of their products in Virginia which is not imposed upon resident manufacturers; these respondents further deny that resident manufacturers are expressly exempted, under section 47 of the Tax Bill, from the payment of a merchant's license tax; but these respondents allege that sections 45, 46 and 47 of the Tax Bill, as amended by chapter 148 of the Acts of 1915, p. 232,

et seq., requires both resident and non-resident manufacturers, who offer for sale at any place or store other than the place of manufacture goods, wares and merchandise manufactured by them, to report in writing under oath to the commissioner of the revenue such goods, wares and merchandise manufactured and sold, or offered for sale, at any other place than the place of manufacture, and that both resident and non-resident manufacturers so offering goods for sale at any other place than the place of manufacture are required to pay a license tax graduated by the amount of purchases made during the period for which the license is granted, and that such purchases include goods, wares and merchandise so manufactured by them and offered for sale at a place other than the place of manufacture. These respondents deny that the provisions of the Virginia Tax Bill aforesaid constitute an interference with interstate commerce in violation of the Federal Constitution and they further deny that they constitute a violation of any other provision of the Federal Constitution. They further deny that said section of the Tax Bill is unconstitutional and void under the decisions of the Supreme Court of Appeals of Virginia and under the decisions of the Supreme Court of the United States.

(6) These respondents allege that, on account of the fact that the complainant sells at its various distributing branch houses in Virginia articles not manufactured by it, as well as articles which are manufactured by it, it is the duty of the commissioners of the revenue of the cities and counties wherein the complainant is doing business in Virginia to assess complainant with a merchant's license tax pursuant to chapter 148 of the Acts of 1915, by including the value of the products of its own manufacture in the purchases
42 which it is required to give in as a basis for issuing a merchant's license tax.

And now, having fully answered the complainant's bill, these respondents pray hence to be dismissed, with their reasonable costs in this behalf expended, and they will ever pray, etc.

COMMONWEALTH OF VIRGINIA,
C. LEE MOORE,
Auditor of Public Accounts of Virginia.
By JNO. GARLAND POLLARD,
Attorney General of Virginia.

June 28, 1915.

STATE OF VIRGINIA,
City of Richmond, To wit:

I, Nelie Vaden, a notary public in and for the city aforesaid, in the State of Virginia, do certify that C. Lee Moore, whose name is signed to the foregoing answer, personally appeared before me in my city aforesaid and made oath that the statements contained in the said answer, so far as made of his own knowledge, are true; and so far as made from knowledge or information derived from others, they are believed to be true.

My commission expires on the 30th day of September, 1917.

Given under my hand this 29th day of June, 1915.

NELIE VADEN,
Notary Public.

COMMONWEALTH
v.
ARMOUR & Co.

COMMONWEALTH'S EXHIBIT No. 1.

A. P. A. 587—4—8—15—15M.

Virginia.

This blank form prepared and furnished by the Auditor of Public Accounts for procuring sworn answers to interrogatories propounded a Merchant applying for State license. This blank form and none other must be used for this purpose.

C. LEE MOORE,
Auditor Public Accounts.

1915.

Interrogatories of Merchant Applying for State License.

VIRGINIA,
County (or City) of.....:

.....191

I, ..., do make oath upon the Holy Bible (or New Testament) (or do affirm because I object to making oath on the Holy Bible or New Testament) that the answers to the interrogatories which follow are true, full, perfect and correct to the best of my knowledge and belief, and they are based upon the most reliable information I have or could have from books, invoices and other papers, records and sources relating to my business as a merchant.

.....
Merchant sign here (see note below).

.....
Place of business.

Subscribed and sworn to before me this..... day of....., 191

.....
Commissioner of the Revenue, or Duly Qualified Deputy.

Interrogatories.

Is this your first year in business as a Merchant?
Answer .....
How many years have you been in business as a Merchant?
Answer .....
Has your business increased or decreased?
Answer .....
What annual rent do you pay for the premises used by you as a Merchant?
Answer .....
If you own the premises what is the annual rental value?
Answer .....
How many assistants, clerks and other employees employed?
Answer .....
What is the average annual cost of such employment?
Answer .....
Do you keep any written record or account of your purchases?
Answer .....
If you do, did the Commissioner of the Revenue ask to examine such record or account?
Answer .....
Did you show the Commissioner of the Revenue such record or account?
Answer .....

If you keep no such record or account, how did you calculate the detailed list of purchases here reported?
Answer .....
.....
.....

What amount of goods, wares and merchandise were bought by you during each of the following months for sale at your place of business at ....., Virginia, (including goods, wares and merchandise manufactured by you to be offered for sale at said place of business, which is not the place of manufacture), viz:

During the month of April, 1914.....	$.....
During the month of May, 1914.....	.....
During the month of June, 1914.....	.....
During the month of July, 1914.....	.....
During the month of August, 1914.....	.....
During the month of September, 1914....	.....
During the month of October, 1914.....	.....
During the month of November, 1914....	.....
During the month of December, 1914....	.....
During the month of January, 1915.....	.....
During the month of February, 1915....	.....
During the month of March, 1915.....	.....
Total	$.....

I, ..., Commissioner of the Revenue (or duly qualified deputy), do certify the Merchant who subscribed to these interrogatories made oath thereto before me on the Holy Bible (or New Testament) (or affirmed thereto because he objected to making oath upon the Holy Bible or New Testament).

Witness my hand this..... day of 191

.....

Commissioner of the Revenue, or Duly Qualified Deputy.

Amount of purchases added by Examiner of Records.....$.....
State Tax on amount added by Examiner of Records.....$.....
Amount of purchases added (or reduced) by Local Board of Review .....$.....
State Tax on amount added (or reduced) by Local Board of Review .....$.....

VIRGINIA,
County (or City) of.....

Office of the Local Board of Review, ..., Virginia.

The foregoing statement by the Local Board of Review is hereby certified to be correct.

LOCAL BOARD OF REVIEW,
By .....,
Chairman (or Acting Chairman.)

Dated 191

Notes.

If the Merchant is an individual, interrogatories to be signed and sworn to by him or her.

If the Merchant is a partnership, interrogatories to be signed and sworn to by one of the partners.

If the Merchant is a company or corporation, interrogatories to be signed and sworn to by the officer having the best and most reliable information from which to answer the interrogatories.

The Commissioner of the Revenue should deliver these interrogatories, with list of Merchants doing business in his district, to the Examiner of Records, who will receive them and examine into their correctness, and then refer them, with the list of Merchants and his report, to the Local Board of Review for further review and correction. The interrogatories and list should be retained in the office of the Board and the Board should make an original list of the Merchants showing amount of purchases on which State License Tax is charged and the amount of State License Tax to be paid by each Merchant, which original list it shall retain in its office. Copy of this list should be sent the Commissioner of the Revenue, the County or City Treasurer, as the case may be, and the Auditor of Public Accounts. The Auditor of Public Accounts will supply blank forms on which to make these lists.

THIS PAGE BOUND

44 COMMONWEALTH'S EXHIBIT NO. 2.

[Seal Virginia, Sic Semper Tyrannis.]

Commonwealth of Virginia,
Auditor of Public Accounts.

RICHMOND, May 19, 1915.

Commissioners of the Revenue.

GENTLEMEN: I address you this communication to call your especial attention to the fact that, under sections 45 and 46 of the Tax Laws, as amended by the act approved March 19, 1915, all manufacturers who engage in this State in the business of a merchant at a place other than the place of manufacture are required to take out merchants' licenses; and this requirement applies not only to non-resident manufacturers who establish a store or place of sale in this State, but it also applies to resident manufacturers who open a place for the sale of their goods other than the place of manufacture.

A manufacturer engaged in business in this State who is taxed upon the capital employed in the business may, without a merchant's license, sell at the place of manufacture, but nowhere else, except by sample, the goods, wares and merchandise manufactured by him, and a non-resident manufacturer, establishing a place of manufacture in this State, and taxed by this State on his capital employed in that business would have the same privilege. If either a non-resident manufacturer or a resident manufacturer desires to sell the goods, wares and merchandise manufactured by him at a definite place or store other than the place of manufacture, then such manufacturer, either resident or non-resident, must, as aforesaid, take out a merchant's license even though this definite place or store be located in the same city or town in which his place of manufacture is established.

When a manufacturer establishes a place or store for the sale of his goods other than at his place of manufacture, the State merchant's license tax required by sections 45 and 46 of the Tax Laws is graded according to his purchases, and all goods, wares and merchandise manufactured by such merchant and sold, or offered for sale, at a place other than his place of manufacture shall be considered as purchases. In other words, both the resident and
45 non-resident manufacturer who establishes a store or place of sale other than the place of manufacture is required to take out a State merchant's license, and the amount of the State license tax is to be graded not only by the amount of the purchases made by such manufacturer from other manufacturers, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale; and he is required to report to the Commissioner not only the amount of goods purchased by him from other manufacturers and offered for sale,

but also the amount of the goods manufactured by him either within or without this State and offered for sale by him at his store or definite place in this State other than the place of manufacture.

The provisions of sections 45 and 46 are to be enforced alike with respect to manufacturers in this State and manufacturers out of this State who engage in this State in the business of merchants elsewhere than at the place of manufacture.

These sections place them upon the same footing and the law should be administered alike to each.

Yours very truly,

C. LEE MOORE,
Auditor Public Accounts.

Answer of Joseph B. Anderson, Commissioner of the Revenue, and Others.

VIRGINIA:

In the Circuit Court of the City of Richmond.

ARMOUR & COMPANY
v.
COMMONWEALTH OF VIRGINIA and Others.

Answer of Joseph B. Anderson, Commissioner of the Revenue for the City of Danville, Va., and Others.

The joint and several answers of Joseph B. Anderson, Commissioner of the Revenue for the City of Danville, Virginia; D. R. Hunt, Commissioner of the Revenue for the City of Roanoke, Virginia; William H. Snead, Commissioner of the Revenue for the City of Lynchburg, Virginia; Chas. H. Callahan, Commissioner of the Revenue for the City of Alexandria, Virginia; D. W. Fowler, Commissioner of the Revenue for the City of Charlottesville,
46 Virginia; Henry E. Tresnon, Commissioner of the Revenue for the City of Richmond, Virginia; R. L. Cosby, Commissioner of the Revenue for the City of Newport News, Virginia; E. J. Doran, Commissioner of the Revenue for the City of Norfolk, Virginia; F. A. Heatwole, Commissioner of the Revenue for the Central District of Rockingham County, Virginia; and W. H. Fletcher, Commissioner of the Revenue for the Western District of Wise County, Virginia, to a bill of complaint filed against them and others in the Circuit Court of the City of Richmond by Armour & Company, a corporation, complainant.

These respondents, reserving to themselves the benefit of all just exceptions to the said bill, for answer thereto, or to so much thereof as they are advised that it is material for them to answer, answer and say:

(1) These respondents admit the allegations made in complainant's bill in paragraph (1).

(2) As to the allegations made in paragraph (2) of complain-

ant's bill, these respondents are not advised and can neither admit nor deny the same.

(3) These respondents admit that the complainant has established at various points in Virginia branch or distributing houses, to which its products are sent to be placed on the market for sale; that it has such distributing houses in the City of Danville, City of Lynchburg, City of Roanoke, City of Alexandria, City of Charlottesville, City of Richmond, City of Newport News, City of Norfolk, Town of Harrisonburg, Rockingham County, and Town of Norton, Wise County; that these respondents, under instructions from C. Lee Moore, Auditor of Public Accounts, are proceeding to assess complainant with a merchant's license pursuant to and in accordance with section 45 of the Tax Bill of the State of Virginia, as amended by chapter 148 of the Acts of 1915, p. 232, as alleged in paragraph (3) of complainant's bill; that these respondents are proceeding to assess complainant pursuant to certain instructions from said C. Lee Moore, Auditor of Public Accounts, and that the first instructions sent out by said C. Lee Moore, Auditor of Public Accounts, were in words and figures identical with Exhibit No. 1 filed by complainant with its bill and contained the interrogatory set out in paragraph (3) of complainant's bill; but these respondents would further show to the court that, after said instructions
47 and form were prepared and sent out as aforesaid, said C. Lee Moore, Auditor of Public Accounts, prepared and sent out to the commissioners of the revenue a supplementary form superceding and taking the place of the aforesaid form, filed with complainant's bill as Exhibit No. 1, and that the said supplementary form, superceding the first form, is filed with the answer of the Commonwealth of Virginia and C. Lee Moore, Auditor of Public Accounts, marked "Commonwealth's Exhibit No. 1," and prayed to be read as a part of this answer; that the interrogatory which would be applicable to the complainant, and which would be required to be propounded to complainant, in lieu of the interrogatory quoted in complainant's bill in paragraph (3), is as follows: "What amount of goods, wares and merchandise were bought by you during each of the following months for sale at your place of business at —, Virginia, (including goods, wares and merchandise manufactured by you to be offered for sale at said place of business which is not the place of manufacture), viz:" (Then follows a list of months covered by the license period, with blanks for the amounts following each month.)

These respondents would further show to the court that, on May 19, 1915, said C. Lee Moore, Auditor of Public Accounts, prepared and sent out special instructions to the commissioners of the revenue in the cities and counties of Virginia, calling their attention to the fact that, under sections 45 and 46 of the Tax Bill, as amended by act approved March 19, 1915, chapter 148, Acts of 1915, p. 232, all manufacturers who engage in this State in the business of a merchant at a place other than the place of manufacture are required to take out merchants' licenses; and that this

requirement applies not only to non-resident manufacturers who establish a store or place of sale in this State, but that it also applies to resident manufacturers who open a place for the sale of their goods other than the place of manufacture. A copy of said letter, marked "Commonwealth's Exhibit No. 2" is filed with the answer of the Commonwealth of Virginia and C. Lee Moore, auditor of public accounts, and prayed to be read as a part of this answer.

(4) These respondents admit the allegations of complainant's bill set out in paragraph (4).

48 (5) These respondents deny that said section 45 of the Tax Bill afore-said operates to discriminate in favor of resident manufacturers and to impose upon non-resident manufacturers a burden of taxation in order to dispose of their products in Virginia which is not imposed upon resident manufacturers; these respondents further deny that resident manufacturers are expressly exempted, under section 47 of the Tax Bill, from the payment of a merchant's license tax; but these respondents allege that sections 45, 46 and 47 of the Tax Bill, as amended by chapter 148 of the Acts of 1915, p. 232, et seq., require both resident and non-resident manufacturers, who offer for sale at any place or store other than the place of manufacture goods, wares and merchandise manufactured by them, to report in writing under oath to the commissioner of the revenue such goods, wares and merchandise manufactured and sold, or offered for sale, at any other place than the place of manufacture, and that both resident and non-resident manufacturers so offering goods for sale at any other place than the place of manufacture are required to pay a license tax graduated by the amount of purchases made during the period for which the license is granted, and that such purchases include goods, wares and merchandise so manufactured by them and offered for sale at a place other than the place of manufacture. These respondents deny that the provisions of the Virginia Tax Bill aforesaid constitute an interference with interstate commerce in violation of the Federal Constitution and they further deny that they constitute a violation of any other provision of the Federal Constitution. They further deny that said section of the Tax Bill is unconstitutional and void under the decisions of the Supreme Court of Appeals of Virginia and under the decisions of the Supreme Court of the United States.

(6) These respondents allege that, on account of the fact that the complainant sells at its various distributing branch houses in Virginia articles not manufactured by it, as well as articles which are manufactured by it, it is the duty of the commissioners of the revenue of the cities and counties wherein the complainant is doing business in Virginia to assess complainant with a merchant's license tax pursuant to chapter 148 of the Acts of 1915, by including the value of the products of its own manufacture in the purchases which it is required to give in as a basis for issuing a merchant's license tax.

49 And now, having fully answered the complainant's bill, these respondents pray hence to be dismissed, with their reasonable costs in this behalf expended, and they will ever pray, etc.

JOSEPH B. ANDERSON,
Commissioner of the Revenue for the City of Danville, Va.,
D. R. HUNT,
Commissioner of the Revenue for the Cityof Roanoke, Va.,
WILLIAM H. SNEAD,
Commissioner of the Revenue for the City of Lynchburg, Va.,
CHAS. H. CALLAHAN,
Commissioner of the Revenue for the City of Alexandria, Va.,
D. W. FOWLER,
Commissioner of the Revenue for the City of Charlottesville, Va.,
HENRY E. TRESON,
Commissioner of the Revenue for the City of Richmond, Va.,
R. L. COSBY,
Commissioner of the Revenue for the City of Newport News, Va.,
E. J. DORAN,
Commissioner of the Revenue for the City of Norfolk, Va.,
F. A. HEATWOLE,
Commissioner of the Revenue for the Central District of Rockingham County, Va.,
W. H. FLETCHER,
Commissioner of the Revenue for the Western District of Wise County, Virginia.,
By JNO. GARLAND POLLARD,
Attorney General of Virginia.

July 14, 1915.

50 In the Circuit Court of the City of Richmond, Virginia.

ARMOUR & Co.
v.
COMMONWEALTH OF VIRGINIA, C. LEE MOORE, Auditor of Public Accounts, and Others.

Stipulation.

Memorandum of agreement, made and entered into this day between Armour & Co., party of the first part, and the Commonwealth of Virginia, C. Lee Moore, auditor of public accounts, and others, parties of the second part.

Witnesseth, that the said parties hereto of the first and second part, covenant and agree that for the purposes of this hearing, whether upon motion to dissolve the injunction heretofore granted in this cause, or upon motion to perpetuate same, that the facts and allegations set out in the second paragraph of the complainant's bill are hereby agreed to be true and accurate.

H. T. HALL,
EPPA HUNTON, JR.,
Counsel for Complainant.

July 23, 1915.

C. B. GARNETT,
Assistant Attorney General and, as such Counsel for Defendant.

Opinion of the Court.

VIRGINIA:

In the Circuit Court of the City of Richmond.

ARMOUR & CO.
v.
THE COMMONWEALTH OF VIRGINIA and Others

Opinion of the Court.

Armour & Co., on the 18th day of May, 1915, instituted its suit against the Commonwealth of Virginia, the auditor of public accounts and others, for the purpose of enjoining the auditor and the commissioners of the revenue of the various cities and counties wherein it was doing business from requiring said company to report as purchases goods, wares and merchandise manu-
51 factured by it at its place of manufacture and shipped to its various depots in Virginia, where it maintains stores for the sale of its products. Upon reading the bill and exhibit therewith an injunction was awarded as prayed for. The auditor and the various commissioners have answered the bill, and upon a stipulation of counsel the facts in the case are agreed. They are as follows: Armour & Co. is a corporation organized under the laws of New Jersey, with packing houses located at Chicago, Ill., and other cities in the United States, and with grapejuice factories at certain places outside of Virginia. In its various manufactories it prepares for sale, as articles of commerce, blood, hair, hides, hoofs, horns, etc., of animals while the other parts of the carcasses fit for human food are manufactured into fresh meat sausages, head cheese, etc. At its grape juice factories the grape juice is manufactured from grapes purchased on the market. The Company maintains distributing houses in various cities and counties in the State of Virginia, for the purpose of disposing of its manufactured products; that it manufactures no goods in this State. The commissioners of the revenue of the cities and counties, under instructions from the

auditor of public accounts, assessed said company with a merchant's license tax, pursuant to the terms of section 45 of the tax bill as amended by chapter 148 of the Acts of 1915, p. 232, section 45, which reads as follows:

"45. Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State, to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State as merchandise shall be considered as purchases within the meaning of this section: provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them. To ascertain the amount of purchases it shall be the duty of such merchant on the first day of April of each year, or within ten days thereafter to make report in writing under oath to the commissioner of the revenue for the district for which he was licensed, showing purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months,
52 except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State. The form of the report required by this section shall be prepared by the auditor of public accounts and furnished to each commissioner of the revenue and by him distributed to each licensed merchant; and each commissioner shall, in the mode prescribed for making such report by him of the violations of the revenue law, report every merchant who shall fail to comply with the requirements of this section. Any person violating the provision of this section shall pay a fine of not less than thirty dollars or more than one thousand dollars for each offense."

The auditor, in accordance with what he deemed the proper construction of said section, prepared and issued to the commissioners of the revenue interrogatories, a copy of which is attached to the bill in this case, in which was the following interrogatory:

"What amount of goods, wares, merchandise were bought by you during each of the following named months (including goods, wares, merchandise manufactured by you outside of Virginia brought or shipped therein by you at — Virginia), viz."

When the injunction was granted on the 18th day of May the auditor on the following day prepared and had distributed to the commissioners of the revenue a new form of interrogatory for merchants applying for State licenses, which he ordered should supersede and take the place of the prior form, and along with said amended interrogatories he sent a letter, in which he put his construction on sections 45, 46 and 47 of the Tax Bill, as amended by chapter 148 of the Acts of 1915, p. 232, as follows:

"All manufacturers who engage in this State in the business of a merchant at a place other than the place of manufacture are required to take out merchant's licenses, and this requirement ap-

plies not only to non-resident manufacturers who establish a store or place of sale in this State, but it also applies to resident manufacturers who open a place for the sale of their goods other than the place of manufacture. A manufacturer engaged in business in this State who is taxed upon the capital employed in the business may without a merchant's license sell at the place of manufacture,
53 but nowhere else except by sample, the goods, wares and merchandise manufactured by him, and a non-resident manufacturer establishing a place of manufacture in this State and taxed by this State on his capital employed in that business would have the same privilege. If either a non-resident manufacturer or a resident manufacturer desires to sell the goods, wares and merchandise manufactured by him at a definite place or store other than the place of manufacture, then such manufacturer, either resident or non-resident, must as aforesaid take out a merchant's license, even though this definite place or store be located in the same city or town in which his place of manufacture is established."

The question for the court to determine is whether the above provisions of the revenue law, the validity of which is questioned in the present case are, as alleged, unconstitutional. The Supreme Court of Appeals in Morris & Co., Inc. v. The Commonwealth, decided November 12, 1914, held (116 Va. 912):

"Under the tax laws of this State imposing a license tax on merchants, graduated in amount by their actual purchases during the preceding twelve months, a non-resident pork packing company, which does not sell in this State pork or beef slaughtered by it, but only sausage, head cheese, mincemeats and other like products produced by it, and articles purchased by it from others, is not liable to the license tax imposed by section 45 of the Tax Bill as to such articles manufactured by it. As to such articles it is a manufacturer and not a merchant, and the license tax which includes butchers is to be graduated by its 'actual purchases.'"

It also held in this case:

"The policy of the State, as it clearly appears from our tax laws, is to encourage manufacturers within its limits, induce them to come into Virginia and establish their plants and thereby contribute to the general prosperity of the State, hence there is no general provision in the tax laws for a tax on manufacturers other than a tax on their capital."

This case also defined "a merchant." It seems that while the above case was under consideration, but before it was decided, the Legislature, by an act approved March 25, 1914, p. 488, amended section 45 as it appears on page 914 of Morris & Co. v. The Commonwealth, to read as follows:

54 "Sec. 45. Every *person, firm, company or corporation engaged in the business of a* merchant shall pay a license tax for the privilege of doing business in this State, to be graduated by the amount of purchases made by him during the period for which the license is granted, *and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State as merchandise shall be considered as purchases within the meaning*

*of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them. * * *"*

The remaining part of this section is as it was and the amendment is underscored. This act did not go into effect in time to be acted on for the year 1914, and at the next session of the Legislature this section was also amended and re-enacted in the above particular, and also by inserting the following:

"Showing purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months, except such goods, wares and merchandise as *is* manufactured by persons, firms and corporations taxed on their capital by this State."

Sections 46 and 47 remain as they were. From the history of the above amendments it would seem that the draughtsman intended to reach the non-resident manufacturer and meet the decision of the Morris case.

The assistant attorney general argues:

"We freely admit that if the statute is to be construed in the way in which it is construed by the complainant in his bill, then it is clearly unconstitutional, and in violation of the commerce clause of the Federal Constitution. Welton v. Missouri, 93 U. S. 373; Webber v. Virginia, 103 U. S. 344, and other United States cases."

And it is further argued that the auditor of public accounts, after a more careful study of the statute, sent out his new inerrogatories and his letter of May 19th. Section 45 was first amended on March 25, 1914, and the court is of opinion that the draughtsman
55 at that time intended to reach the non-resident manufacturer and make him pay on the goods manufactured by him outside of the State and sold within the State, and there was no intention at that time to tax the resident manufacturer other than on his capital invested in his business, and that the resident manufacturer be allowed to sell anywhere in the State. It would also appear that the auditor of public accounts had an abundance of time to carefully study these various amendments, and that the interrogatories sent out by him, a copy of which is filed with the bill, showed what his construction was of said amendments. It does not seem that at that time there was in his mind that the policy of the State relative to the taxation of resident manufacturers had been changed by the Legislature. The court is of opinion that in enacting the amendments to the statute in question the Legislature discriminated in favor of goods manufactured by residents of this State, and against goods manufactured elsewhere. Our Supreme Court of Appeals, in Meyer's Case, 92 Va., at page 816, says:

"Where any injurious discrimination is discovered in favor of the resident against the non-resident or with respect to the sales of articles manufactured in this State over similar articles manufactured abroad, the State laws are declared to be void, as repugnant to the Constitution of the United States."

And to the same effect is Ex parte Rollins, 80 Va. 314. But it is argued by the able assistant attorney general that the construction placed upon the statute by the auditor is the correct construction of the law, and that it harmonizes the apparently conflicting sections and that the court should give great weight to the practical construction placed upon revenue laws by the fiscal officers of the Commonwealth, and he cites Commonwealth v. Werth, 116 Va. 604. This case merely refers to the case of Smith v. Bryan, 100 Va., p. 204. The court there says:

"The practical construction given to a statute by public officials, and acted upon by the people, is not only to be considered, but in cases of doubt, will be regarded as decisive. It is allowed the same effect as a course of judicial decision. The legislature is presumed to be cognizant of such construction, and when long continued, in the absence of legislation evincing a dissent, the courts will
56 adopt that construction. Contemporaneous construction and official usage for a long period by persons charged with the administration of the law have always been regarded as legitimate aids in the construction of statutes. Sutherland on Stat. Con., sec. 309."

The auditor has construed this statute in two different ways. The legislation is new, never has been acted upon, and, in fact, the Legislature never has changed the public policy of the State relative to tax on resident manufacturers, and the construction the auditor puts on section 45 is contrary to the very language of section 47 of the same act, and to the latter part of section 45. The court is of opinion, from a careful consideration of sections 45, 46 and 47, as amended by the acts of 1915, that the legislature, whatever may have been the intention of the draughtsman of the amendment of section 45, never meant to change the policy of this State relative to the taxation of resident manufacturers as set forth in the Morris case, and as specifically expressed in the legislative act, section 47 of the Tax Bill. Not only did the legislature not change section 47 as it was enacted when the Morris case was decided, but deliberately refused to do so.

This section was amended and re-enacted by an act approved March 15, 1915. At the end of the first paragraph it was added: "*Except as otherwise provided by law with reference to the licensing of merchants by the State.*" Four days afterwards, this same section was amended and re-enacted and the above amendment left out, leaving section 47 just where it was when the Morris case was decided. (Chapter 148, page 236, Acts. 1915.)

The courts must presume that after mature deliberation and consideration the legislature did not approve of the above amendment enacted on March 15th, 1915. The construction now put upon the act by the auditor is most ingenious, but not according to the law as enacted. It is not for the auditor nor for the courts to make the law. This is a legislative function, and the court cannot set at naught the plain language of the legislative act, which provides: "But nothing in the foregoing shall be construed as requiring * * * manufacturers to pay a merchant's license for so doing."

In Supervisors v. Tallant, 96 Va. 726, it is held: "It is well settled that statutes levying duties *on* taxes upon citizens are to be construed most strongly against the government and in favor of the citizen, and these provisions are not to be extended, by implication, beyond the clear import of the language used. Revenue laws are neither
remedial statutes nor laws founded upon any permanent
57 public policy, and are not, therefore, to be liberally construed.
Hence, whenever there is a just doubt that doubt should absolve the taxpayer from his burden. Planer Co. v. Flournoy, 88 Va. 1029, and authorities there cited."

The court is of opinion that the construction placed upon the amendment to section 45 is contrary to the latter part of section 45, which provided "except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State." Section 46, which provides "the sums imposed under and by virtue of this section shall be in lieu of all taxes for State purposes upon the capital actually employed by said merchants or mercantile firm or corporation in said business, except the regulation fee and franchise tax and except that said merchants shall not be exempt," etc., and further with section 47, which is not amended, but remains as it was, the court being of opinion that the law is at present that resident manufacturers who pay on their capital at the place of business, can sell at other places in this State without the payment of a merchant's license tax, and that section 45 places a merchant's license tax upon the goods manufactured by manufacturers outside of the State, and not upon goods manufactured within the State, that it is discriminating and contrary to the interstate commerce clause of the Federal Constitution and void. See the cases cited, supra, both of this State and the Supreme Court of the United States, of which one of the most interesting is the case of Webber v. Virginia, 103 U. S. 344. That case went up from the County Court of Henrico County through the old Circuit Court to the Supreme Court of Appeals, and was decided in 33 Gratt. 896, and it is interesting to note that such able lawyers as Judge Crump and Judge Meredith in the lower courts made slight, if any, reliance upon the interstate commerce clause of the Constitution, and Judge Staples, one of the ablest justices who ever adorned our Supreme Bench considered this question of little consequence, but when it came to the Supreme Court of the United States, Mr. Justice Field reversed all the State courts, saying that it was the only question in the case.

It is argued that it is the duty of the court to so construe these sections that they shall stand together, and that the auditor's construction is to this effect. It is undoubtedly true that the court should endeavor to so construe these acts that they consist rather than fall.
However, after a most careful consideration the court is of
58 opinion that they are so contradictory and inconsistent as to make this impossible. And it would appear that the law remains as it was when the Morris case was decided and that both resident and non-resident manufacturers are not required to take out a merchant's license in order to sell their manufactured products

in Virginia or to include in their application for a merchant's license the value of the products manufactured and sold by them.

On the undisputed facts in the case the court is of opinion, and so decides that section 45 of the new tax law is unconstitutional, being in violation of the interstate commerce clause of the Constitution, and that the injunction prayed for in the original and amended bills, should be made permanent, and a decree will be entered to this effect.

Transcript from the record.

Teste:

E. M. ROWELLE, *Clerk.*

Fee for Transcript, $11.00.

I, E. M. Rowelle, clerk of the Circuit Court of the City of Richmond, do hereby certify that counsel for the plaintiff has had notice of the Commonwealth's intention to apply for the foregoing transcript.

E. M. ROWELLE, *Clerk.*

A Copy—Teste:

H. STEWART JONES, *C. C.*

59 Cardwell, J., absent.

KEITH, P.:

Armour & Company is a corporation organized under the laws of the State of New Jersey, and duly licensed and qualified to do business in this State. Its business consists of slaughtering animals and preparing their carcasses for sale, and it has packing houses in several States. Its chief business is that of a manufacturer. In disposing of its products it has established at various points in Virginia distributing houses, and the commissioners of the revenue in the cities and counties in which it does business have assessed it with a merchant's State license tax pursuant to the provision of section 45 of the tax bill, approved March 19, 1915.

Armour and Company filed its bill in the Circuit Court of the city of Richmond, praying that the officials of the State be enjoined from the assessment of the tax which is being made against it, upon the ground that the statute under which they are acting is unconstitutional as being an interference with interstate commerce and violative of Article I, sec. 8, clause 3, of the Federal Constitution: that it is in conflict with Article IV, section 2, of said Constitution, which guarantees equal privileges and immunities to the citizens of the several States, and further violates Article XIV, section one, which forbids any State from making and enforcing laws which abridge the privileges or immunities of citizens of the United States, and guarantees to them the equal protection of the laws.

The defendants filed their answer, in which they put in issue every material allegation of the bill, with the exception that the allegations made in the second paragraph of the bill as to the character and extent of the business done by Armour and Company are expressly admitted to be true.

The case was finally heard before the circuit court upon the orig-

inal and amended bills, the answers of the defendants and the exhibits, and a decree was entered enjoining the various State officers from requiring Armour and Company to include as purchases the wares, goods and merchandise manufactured by it outside of
60 Virginia and brought or shipped therein for sale, in its application for a merchant's license to do business in the respective cities and counties of the Commonwealth.

The auditor of public accounts addressed a communication to the commissioners of the revenue of the State, in which he calls their especial attention to sections 45 and 46 of the tax laws, as amended by the act approved March 19, 1915, requiring all manufacturers who engage in this State in the business of a merchant at a place other than the place of manufacture to take out merchants' licenses, and that this requirement applies not only to non-resident manufacturers who establish a store or place of sale in this State, but also to resident manufacturers who open a place for the sale of their goods other than the place of manufacture. He instructs them in this letter, that "A manufacturer engaged in business in this State who is taxed upon the capital employed in the business may, without a merchant's license, sell at the place of manufacture, but nowhere else, except by sample, the goods, wares and merchandise manufactured by him, and a non-resident manufacturer establishing a place of manufacture in this State, and taxed by this State on his capital employed in that business, would have the same privilege;" that "if either a non-resident manufacturer or a resident manufacturer desires to sell the goods, wares, and merchandise manufactured by him at a definite place or store other than the place of manufacture, then such manufacturer, either resident or non-resident, must, as aforesaid, take out a merchant's license, even though this definite place or store be located in the same city or town in which his place of manufacture is established. When a manufacturer establishes a place or store for the sale of his goods other than at his place of manufacture, the State's merchant's license tax required by sections 45 and 46 of the Tax Laws is graded according to his purchases, and all goods, wares and merchandise manu-
61 factured by such merchant and sold, or offered for sale, at a place other than his place of manufacture shall be considered as purchases. In other words, both the resident and non-resident manufacturer who establish a store or place of sale other than the place of manufacture are required to take out a State merchant's license, and the amount of the State license tax is to be graded not only by the amount of purchases made by such manufacturer from other manufacturers, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale; and he is required to report to the commissioner not only the amount of goods purchased by him from other manufacturers and offered for sale, but also the amount of the goods manufactured by him either within or without this State and offered for sale by him at his store or definite place in this State other than the place of manufacture." The letter of instruction concludes with the statement, that the provisions of sec-

tions 45 and 46 are to be enforced alike with respect to manufacturers in this State and manufacturers out of this State who engage in this State in the business of merchants elsewhere than at the place of manufacture.

In the case of Commonwealth v. Myer, 92 Va. 809, this court said: "The State of Virginia has the right to impose a tax on peddlers, where it operates uniformly upon all citizens and does not discriminate in favor of citizens of this State and against citizens of other States, or where the tax imposed is in the exercise of police powers and not a regulation of commerce under cover of that power, although incidentally it may have that effect; but where any injurious discrimination is made in favor of the resident against the non-resident, or with respect to the sales of articles manufactured in this State over similar articles manufactured abroad, the law is repugnant to the Constitution of the United States, and therefore
62 void."

The principle enunciated in that case has been uniformly followed by this court, and we shall now inquire whether it has been violated by the statute under consideration.

In Morris & Co. v. Commonwealth, 116 Va. 912, sections 45 and 46 of the tax law, as they stood at the time of that decision, imposed on merchants a license tax graduated in amount by their actual purchases during the preceding twelve months; and it was held that "a non-resident pork-packing company, which does not sell in this State pork or beef slaughtered by it, but only sausage, head cheese, mince meats and other like products produced by it, and articles purchased by it from others, is not liable to the license tax imposed by section 45 of the tax bill as to such articles manufactured by it. As to such articles it is a manufacturer and not a merchant, and the license tax, which includes butchers, is to be graduated by its 'actual purchases.'"

To meet this decision section 45 was amended by an act approved March 19, 1915, which declares, among other things, that "all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State, as merchandise, shall be considered as purchases within the meaning of this section; provided that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them." The section then provides that "To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue for the district for which he was licensed, showing purchase as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months; except
63 such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State."

It will be observed that in section 45 the very broadest language is used—"Every person, firm, company or corporation engaged in

the business of a merchant shall pay a license tax * * * " That language, of course, embraces all resident as well as non-resident persons, etc., who engage in the business of a merchant, and requires the same license tax of each and all of them. Then follows the proviso that "this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them," which means, in the case of a non-resident firm, company or corporation a tax upon that part of its capital stock employed in the conduct of its business in this State. That part of the section which deals with the mode of ascertaining the amount of the purchases is equally comprehensive in its terms and applies to all who are embraced in the first section of the statute.

But it is claimed that that part of the section which declares that it shall not be construed as applying to manufacturers taxed on capital by this State who offer at the place of manufacture goods, wares and merchandise manufactured by them, is a discrimination against the foreign manufacturer, because, having no place of manufacture within the State, he cannot have the advantage of the exemption which is enjoyed by the domestic manufacturer.

This point was disposed of by the Supreme Court of the United States in the case of New York v. Roberts, 171 U. S. 658, 43 L. Ed. 323. In that case a statute of New York was construed, which required every corporation organized under the laws of New York, or any other State or country, and doing business in New York, except certain companies, including manufacturing corporations wholly engaged in carrying on manufacture within the State, to
64 pay into the State treasury annually a tax upon its business, based upon the amount of the capital stock actually employed within the State. Parke, Davis & Co., was a corporation organized under the laws of the State of Michigan for the manufacture and sale of chemical and pharmaceutical preparations. Its factory was situated in the city of Detroit. The corporation established a warehouse and depot in the city of New York and there kept on hand varying quantities of its manufactured products, which were there sold at wholesale in original packages. The company paid an annual rental of $12,500 for its place of business in New York, and employed fifty persons in its New York branch, and for the years 1890 to 1894 inclusive, expended for this branch from $102,000 to $172,000. The average stock of goods sent from Michigan and carried in New York was $50,000. It also employed in New York during that time a continuing capital of from $23,000 to $62,000, used in the purchase and sale of crude drugs. Upon this state of facts the comptroller of New York imposed for 1894 and five previous years an annual tax based upon the sum of $90,000 as capital employed within the State. Parke, Davis & Co., filed a petition before the Supreme Court of New York, praying for a writ of certiorari directed against the comptroller in order to correct the assessment, alleging that as said company was a manufacturing corporation, it was exempted from taxation under the laws of the State of New York, and that the comptroller erred in deciding that goods manufactured by

the corporation and stored in its depot in New York was capital employed in the State within the meaning of the statute; and that if the statute was correctly interpreted by the comptroller then it was unconstitutional and void as in contravention of the Constitution of the United States and amendments thereto. By successive appeals the case was brought to the Supreme Court of the United States,
65 which, after holding that the construction put upon the statute by the State of New York was binding upon the Supreme Court of the United States, took up the contention that the corporation, being a Michigan corporation and having complied with the provisions of the law for transacting business within the State of New York, was denied the equal protection of the law when subjected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within that State, and that such a tax was an unjust discrimination against this Michigan corporation whose place of manufacture was in the State of Michigan. On this point the court said: "If the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that, obviously, such is not the purpose of this legislation." Quoting from the statute, the court then goes on to say: " 'Every corporation, joint-stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State, or in any other State or country and doing business in this State * * * shall be liable to and shall pay a tax as a tax upon its franchises or business into the State treasury annually, to be computed as follows: It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacturing or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, wholly engaged in manufacturing within the State.

"In construing this statute it was held in the case of People, Blackington & Co. v. Roberts, 4 App. Div. 388, that a New York
66 corporation which carried on a manufacturing business in another State was liable to this tax; and this decision was affirmed by the New York Court of Appeals, 151 N. Y. 652.

"The tax is graded according to annual dividends, and originally was assessed upon the entire capital of a corporation; but the statute was amended in 1885 so as to read: 'The amount of capital stock which shall be the basis for tax under the provisions of section three, in the case of every corporation, joint-stock company and association liable to taxation thereunder, shall be the amount of capital stock employed within this State.' So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States to the detriment of the latter, or to subject property out of the State to taxation."

The name being changed, the law as there declared is, we think, precisely applicable to the case in hand.

In Plummer v. Coler, 178 U. S. 115, 132, 44 L. Ed. 999, the court, in considering the case of New York v. Roberts, supra, used the following language: "An effort was made to have a tax imposed against corporations based upon 'capital employed within the State' declared invalid in that particular case, because a portion of such capital consisted of imported goods in original packages; and this court said: 'Again, it is said that, even assuming that the importation of crude drugs and their sale in the original package constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of Brown v. Maryland, 12 Wheat. 419, 6 L. Ed. 678. But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise
67 of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested."

In Reymann Brewing Co. v. Brister, 179 U. S. 445, 45 L. Ed. 469, the brewing company, a corporation of the State of West Virginia, with its principal office in the city of Wheeling, filed its bill of complaint in the Circuit Court of the United States for the Southern District of Ohio, seeking to restrain and enjoin the treasurer of Jefferson county, Ohio, from retaining possession of certain personal property belonging to the brewing company, which he had seized in enforcing what was known as the Dow Tax Law of the State of Ohio. Under the terms of the law it was provided that, "upon the business of trafficking in spirituous, vinous, malt or other intoxicating liquors there shall be assessed annually, and paid into the county treasury as hereinafter provided, by every person, corporation or partnership engaged therein, and for each place where such business is carried on by or for such person, corporation or partnership, the sum of three hundred and fifty dollars." It was alleged by the complainant whose property had been seized to enforce the payment of the assessment, that the statute was void because it discriminated in favor of the manufacturers and brewers of beer who had their plants located within the State of Ohio as against those who had their plants located in other States, and because it constituted in its practical operation a regulation of commerce between the States. On this point the court said:

"So far as the terms of the statute are concerned, they do not disclose any intention to discriminate between foreign and domestic dealers in intoxicating liquors, as the tax in queston is to be assessed upon every person, corporation or co-partnership engaged in the business of trafficking in such liquors. But it is contended that the effect of the legislation, necessarily results in such a dis-
68 crimination, because of the provisions of the eighth section of the statute, which is in the following words:

" 'The phrase "trafficking in intoxicating liquors," as used in this act, means the buying or procuring and selling of intoxicating liquors otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any time.'

"The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture, without being subjected to the tax, and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities not less than one gallon at any one time, such a provision operates as an illegal discrimination against the foreign competitor, who must necessarily sell at places other than the place of manufacture.

"Under this provision, the manufacturers, whether within or without the State, may sell at the manufactory and ship to any part of the State of Ohio, and the incidental disadvantage that the foreign manufacurer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the State of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention on the part of the State legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another
69 State, it would be subjected to the tax if it sold intoxicating liquor at a place within the State of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax." The opinion then goes on to cite New York v. Roberts, supra, and to reaffirm the law as there stated.

We think the authorities cited dispose of the contention that the statute is discriminatory because it excepts from its operation domestic manufacturers who sell their products at the place of manufacture. We have been unable to discover (in the language of Commonwealth v. Myer, supra) that any injurious discrimination is made in favor of the resident against the non-resident, or with respect to the sale of articles manufactured in the State over similar articles manufactured abroad.

It is contended that the second sentence of section 45 is in conflict with the first sentence. When the section is read as a whole and the object of the statute is considered, we do not think that any conflict appears. The statute was intended to reach the merchant who is also a manufacturer, and to protect the manufacturer in so far as he does not engage in the business of a merchant in competition with other merchants. The legislature, therefore,

required a manufacturer, who is also a merchant, to take out a merchant's license for doing the business of a merchant at a fixed place apart from the place of manufacture, and to return as purchases, not only goods bought from others, but also goods manufactured by the merchant and offered for sale at his store, the same being separate and apart from the place of manufacture. Thus construed, no conflict appears.

But it is a well settled rule of construction that, if a statute be susceptible of two constructions, we should adopt that con-
70 struction which renders the statute free from constitutional objection and gives it a sensible operation.

We are further of opinion that if the construction were doubtful the letter of instruction issued by the auditor of public accounts to the commissioners of the revenue, and which was their exclusive guide in the practical operation of the law would be entitled to very great weight, and those instructions are wholly free from any attempt to discriminate in favor of resident as against non-resident applicants for a merchant's license. The commissioners are in plain terms told that all manufacturers engaged in this State in the business of a merchant at a place other than the place of manufacture are required to take out merchants' licenses; and this requirement applies not only to non-resident manufacturers who establish a store or place of sale in this State, but it also applies to resident manufacturers who open a place for the sale of their goods other than the place of manufacture. They are told that a manufacturer engaged in business in this State who is taxed upon the capital employed in the business may, without a merchant's license, sell at the place of manufacture, but nowhere else, except by sample, the goods, wares and merchandise manufactured by him, and a non-resident manufacturer, establishing a place of manufacture in this State, and taxed by this State on his capital employed in that business, would have the same privilege—meaning, as we have hereinbefore said, so much of the capital stock as is actually employed within the limits of this Commonwealth. They are told that if either a non-resident manufacturer or a resident manufacturer desires to sell the goods, wares and merchandise manufactured by him at a definite place or store other than the place of manufacture, then such manufacturer, either resident or non-resident, must take out a merchant's license even though this definite place or store be located in the same city or town in which his place of manufacture is established.
71 And finally he declares, that both the resident and non-resident manufacturer who establishes a store or place of sale other than the place of manufacture is required to take out a State merchant's license, and the amount of the State license tax is to be graded not only by the amount of the purchases made by such manufacturers from other manufacturers, but also by the goods, wares and merchandise manufactured by him and sent from the place of manufacture to his store for sale.

But it is claimed that there is a conflict between section 45 and section 47, and that section 47, being the later section, must prevail.

By section 47 it is enacted that, "Every railroad company or other

incorporated company in this commonwealth, whether such privilege be granted in its charter or not, which shall sell any mineral or forest product, or any other article, shall be taxed as other merchants dealing in like commodities. This act shall apply to companies keeping commissaries, or having agents for the sale of any other article than their own product; provided, that nothing herein contained shall prevent a railroad company from buying and distributing to its employes, as part of their compensation, meat, meal and flour, at the cost price thereof; but nothing in the foregoing shall be construed as requiring a company selling the products of their own mines, or lands, or manufacturers, to pay a merchant's license for so doing." The contention is that the proviso is directly inconsistent with section 45, and that by force of the proviso no license tax can be levied upon Armour & Co. for selling the products of its own manufacture.

In United States v. Packages of Spirituous Liquors, 65 Fed. 980, the court said: "A general rule of interpretation is that a proviso must be construed with reference to the subject matter of the section of which it forms a part, unless there is manifest legislative intention that it should limit the operation of the other sections of the
72 act."

In Dollar Savings Bank v. United States, 19 Wall. 227, in discussing the effect of a proviso to an act of Congress, the court said: "The broad construction of the proviso contended for makes it plainly repugnant to the body of the act, and it is, therefore, inadmissible."

In 2 Lewis' Sutherland Statutory Construction (2d ed.), section 352, it is said: "The natural and appropriate office of the proviso being to restrain or nullify some preceding matter, it should be confined to what precedes it, unless it clearly appears to have been intended to apply to some other matter.

In Calloway v. Harding, 23 Gratt. (64 Va.) 542, this court held that a proviso to one section of an act cannot be applied to another section of the same act, unless it manifestly appears, by reference to the whole act, that it was the intention of the legislature that such proviso should limit the operation of other sections than that to which it is appended.

So far from its appearing to have been the manifest intention of the legislature that the proviso in section 47 should apply to the entire act, we are of opinion that it is manifest that the legislature did not intend it so to do, as it would be plainly repugnant to the body of the act.

We are of opinion that the provisions of the statute called in question are constitutional, that their proper construction does not involve a conflict between the several sections and that upon the whole case the decree of the circuit court should be reversed.

Reversed.

73 VIRGINIA:

In the Supreme Court of Appeals, held at the Library Building in the City of Richmond on Thursday the 13th day of January, 1916.

COMMONWEALTH OF VIRGINIA, Appellant,
against
ARMOUR & COMPANY, Appellee.

Upon an appeal from and supersedeas to a decree pronounced by the circuit court of the City of Richmond on the 30th day of July, 1915.

This day came again as well the Attorney General on behalf of the Commonwealth as the appellee, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the said decree is erroneous. It is therefore adjudged, ordered and decreed that the same be reversed and annulled and the Commonwealth recover of the defendant in error her costs by her expended about the prosecution of her appeal and supersedeas aforesaid here.

And this Court proceeding to enter such decree as the said Circuit Court ought to have entered, it is adjudged, ordered and decreed that the injunction awarded in this cause be and the same is hereby dissolved and the bill dismissed, and that the Commonwealth recover of the plaintiff her costs about her defence in the said circuit court expended.

Which is ordered to be certified to the said circuit court.

A copy,

Teste:—

H. STEWART JONES, *C. C.*

74 *Authentication of Record.*

SUPREME COURT OF APPEAL, STATE OF VIRGINIA, *ss:*

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the foregoing pages, numbered from 1 to 74, inclusive, are a true, full and complete transcript of the record and proceedings, in the case of Commonwealth of Virginia, Plaintiff, vs. Armour & Company, Defendant, and also of the opinion of the Court rendered therein, as the same now appear on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Richmond, Virginia, this March 15th, 1916.

H. STEWART JONES,
Clerk, Supreme Court of Appeals of Virginia,
at Richmond, Virginia.

I, James Keith, one of the Judges and the President of the Supreme Court of Appeals of the State of Virginia, do hereby certify that the foregoing is the true and genuine signature of H. Stewart Jones, Clerk of said Court, and that the foregoing attestation made by him is in due form.

Witness my hand and seal this the 15th day of March, 1916.

[SEAL.] JAMES KEITH,

President, Supreme Court of Appeals of Virginia.

I, H. Stewart Jones, Clerk of said Court, do hereby certify that the Honorable James Keith, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, President of the Supreme Court of Appeals of the State of Virginia, duly commissioned and qualified.

Witness my hand and the seal of said Court, this the 15th day of March, 1916.

[Seal Supreme Court of Appeals of Virginia, Richmond.]

H. STEWART JONES,

Clerk, Supreme Court of Appeals of Virginia,
At Richmond, Virginia.

Endorsed: File No. 25191. Virginia Supreme Court of Appeals. Term No. 416. Armour & Company, plaintiff in error, vs. The Commonwealth of Virginia. Filed March 21st, 1916. File No. 25191.

Office Supreme Court, U. S.
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JAMES D. MAHER,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917.

No. 127.

ARMOUR & COMPANY

versus

COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR.

RICHMOND PRESS, INC., PRINTERS

Subject Index

Page No.

Statement of the case. 1
Argument. 7

CASES CITED IN BRIEF.

Page No.

Austin *v.* Tenn., 179 U. S. 343. 19
Brennan *v.* Titusville, 153 U. S. 289. 19
Brimmer *v.* Rebman, 138 U. S. 78. . . . . 16, 19, 20, 21, 23
Commonwealth *v.* Myer, 92 Va. 809. 9
Darnell & Son *v.* Memphis, 208 U. S. 113. . . . . 19, 21, 23
Foote *v.* Maryland, 232 U. S. 494. 19
Guy *v.* Baltimore, 100 U. S. 434. 13
Hinson *v.* Lott, 8 Wall. 148. 11
Minnesota *v.* Barber, 136 U. S. 313, 319. . . . . 17, 18, 19
Morris & Co. *v.* Commonwealth, 116 Va. 912. . . . . 6, 7, 24
New York *v.* Roberts, 171 U. S. 658. . . . . 20, 21, 22, 23
Plumley *v.* Mass., 155 U. S. 461. 19
Plummer *v.* Coler, 178 U. S. 115. . . . . 20, 22
Reyman Brewing Co. *v.* Brister, 179 U. S. 445. . . . 20, 22
Robbins *v.* Shelby Taxing District, 120 U. S. 489, 497. 17
Smith *v.* St. Louis & S. W. Ry. Co., 181 U. S. 248. . . 19
Voight *v.* Wright, 141 U. S. 62. 19
Walling *v.* Michigan, 116 U. S. 446. 15
Ward *v.* Maryland, 12 Wall. 418. 11
Webber *v.* Virginia, 103 U. S. 344. 13
Welton *v.* State of Mo., 91 U. S. 275. 12
Woodruff *v.* Parham, 8 Wall. 123. 10

IN THE

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ARMOUR & COMPANY

versus

COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

BRIEF OF PLAINTIFF IN ERROR.

This case is before this court on an appeal from the final decree of the Supreme Court of Appeals of Virginia, entered on the 13th day of January, 1916, reversing the decree of the Circuit Court of the City of Richmond, made and entered in said cause on the 30th day of July, 1915, enjoining the Auditor of Public Accounts of the State of Virginia and certain Commissioners

of the Revenue from requiring Armour & Company to include certain goods and merchandise in its application for a merchant's license to do business in certain cities and counties of the State of Virginia.

STATEMENT OF THE CASE.

Armour & Company filed its bill of complaint in the Circuit Court of the City of Richmond against the Commonwealth of Virginia, C. Lee Moore, Auditor of Public Accounts, and various commissioners of the revenue for various cities and counties of the State of Virginia, representing that it was a non-resident corporation, duly licensed to do business in the State of Virginia; that it was engaged in the manufacturing business, with packing houses located in various cities outside of the State of Virginia; that it had established at various points in the State of Virginia branch or distributing houses, to which its manufacturing products were sent to be sold; that the Commissioners of Revenue of the various cities and counties wherein its branch or distributing houses were located, were proceeding to assess Armour and Company with a merchant's State license tax under Sec. 45 of the tax bill as amended by Acts of 1915, Chap. 148, page 233, which was a tax based on the amount of purchases; that said Armour & Company was selling at its various distributing houses in Virginia, certain articles of merchandise not manufactured by it, and was required to take out a merchants' license for each of its branch distributing houses in order to handle articles not manufactured by it; and that the Commissioners of Revenue were proceeding to assess the plaintiff pursuant to instructions from the Auditor of Public Accounts, and to require it to return as purchases not only goods, wares and merchandise pur-

chased from other houses, but also goods, wares and merchandise manufactured by said Armour & Company; it was alleged that said Sec. 45 of the tax bill as amended operated to discriminate in favor of resident manufacturers, and to impose upon non-resident manufacturers a burden of taxation in order to dispose of their products in Virginia which was not imposed upon resident manufacturers; and that Sec. 45 of the tax bill as amended was an interference with Interstate Commerce and a violation of the commerce clause of the Federal Constitution and therefore unconstitutional and void; and that it was repugnant to other provisions of the Federal Constitution; it was further alleged that the interrogatories prepared by the Auditor of Public Accounts demonstrated the discriminatory nature of the act in question; and that the necessary effect of the enforcement of the said act was to discriminate against non-resident manufacturers by requiring them to pay a license tax on their sales in Virginia, and by not requiring resident manufacturers to pay a like merchants tax on their sales in Virginia.

A preliminary injunction was granted in accordance with the prayer of the bill.

At the hearing the Commonwealth of Virginia and C. Lee Moore, Auditor of Public Accounts, filed their joint and several answers setting out new interrogatories prepared by the Auditor of Public Accounts, and filing as an exhibit therewith the instructions of the Auditor sent to the Commissioners of Revenue, dated May 19, 1915, the day after the preliminary injunction was granted, and giving another construction of Secs. 45 and 46 of the tax bill as amended, and denying that Sec. 45 of the tax bill as amended operated to discriminate in favor of resident manufacturers, and to impose upon

non-resident manufacturers a burden not imposed upon resident manufacturers.

The Circuit Court of the City of Richmond entered an order perpetuating the injunction, upon the ground that Sec. 45 of the tax bill as amended was unconstitutional and in violation of the interstate commerce clause of the constitution.

An appeal was taken from the order of the Circuit Court of the City of Richmond perpetuating the injunction to the Supreme Court of Appeals of Virginia, and on the 13th day of January, 1916, the said decree was reversed by the Supreme Court of Appeals of Virginia, and the written opinion reversing the same will be found in the record, beginning at page 58.

Sec. 45 of the tax bill for a number of years prior to March 25, 1914, was as follows:

> "Every merchant shall pay a license tax for the privilege of transacting business in this State, to be graduated by the amount of purchases made by him during the period for which his license is granted. To ascertain the amount of purchases, it shall be the duty of such merchant, on the 1st day of April of each year, or within 10 days thereafter, to make report in writing under oath to the Commissioner of the Revenue of the District for which he was licensed, showing the amount of goods actually bought by him during the next preceding twelve months."

By an Act of the General Assembly of Virginia approved March 25, 1914, this section was amended so as to read as follows, the respects in which it was amended being in italics:

> "*Every person, firm, company or corporation engaged in the business* of a merchant, shall pay

a license tax for the privilege of doing business in this State, to be graduated by the amount of purchases made by him during the period for which the license is granted, *and all goods, wares and merchandise manufactured by such concern and sold or offered for sale in this State as merchandise shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on CAPITAL by this State who offer for sale at the place of manufacture goods, wares and merchandise manufactured by them.* To ascertain the amount of purchases it shall be the duty of such merchant on the first day of April of each year, or within ten days thereafter to make report in writing under oath to the Commissioner of the Revenue for the district for which he was licensed, showing the amount of goods actually bought by him during the next preceding twelve months."

At the next session of the General Assembly, Acts 1915, page 233, this section was re-enacted and was amended so as to read as follows, the respect in which it was amended being in italics:

"Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this State, as merchandise, shall be considered as purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, ware and merchandise manufactured by them. *To ascertain the amount of purchases it shall be the duty of such merchant, on*

the first day of April of each year, or within ten days thereafter, to make report in writing under oath, to the commissioner of the revenue, for the district for which he was licensed, showing purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months; except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State."

In the opinion handed down by the Supreme Court of Appeals in this case, the following statement is made:

"In *Morris & Co. vs. Commonwealth*, 116 Va. 912, sections 45 and 46 of the tax law, as they stood at the time of that decision, imposed on merchants a license tax graduated in amount by their actual purchases during the preceding twelve months; and it was held that 'a non-resident pork-packing company, which does not sell in this State pork or beef slaughtered by it, but only sausage, head cheese, mince meats and other like products produced by it, and articles purchased by it from others, is not liable to the license tax imposed by section 45 of the tax bill as to such articles manufactured by it. As to such articles it is a manufacturer and not a merchant, and the license tax, which includes butchers, is to be graduated by its 'Actual purchases.'

"To meet this decision section 45 was amended by an act approved March 19, 1915, which declares, among other things, that 'all goods, wares and merchandise manufactured by such merchant and sold or offered for sale in this State as merchandise, shall be considered as purchases within the meaning of this section; provided that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them.' "

It, therefore, appears in the record that the amendment to Sec. 45 was made for the purpose of meeting the decision in *Morris & Co.* vs. *Commonwealth,* where a non-resident pork manufacturer was held to be not liable for the merchant's license tax upon goods manufactured by him outside of Virginia and sold in Virginia.

The assignments of error will be found in the Record beginning on page 3.

Briefly, they allege that the Supreme Court of Appeals of Virginia erred in holding Clause 45 of the Tax Bill of Virginia valid and constitutional for the following reasons:

(1) Because it is a violation of the Interstate Commere Clause of the Constitution and an attempted regulation thereof.

(2) Because it deprives the plaintiff in error, a citizen of another state, of the privileges and immunities of citizens of the State of Virginia.

(3) Because it deprives the plaintiff in error of the equal protection of the law.

ARGUMENT.

The sole question to be determined in this case is whether Sec. 45 of the tax bill is repugnant to the Constitution of the United States.

It was admitted in the argument that the statute as construed in the bill, which is in accordance with the construction given it in the first set of interrogatories prepared by the Auditor, is discriminatory, invalid and unconstitutional.

The construction put upon the statute by the Supreme Court of Appeals of Virginia is, of course, bind-

ing upon this court, but it is maintained that it is equally true that when Sec. 45 is construed as it has been by the Virginia Court, and as it was in the second set of interrogatories prepared by the Auditor and his instructions to the various commissioners of the revenue, that it is discriminatory, invalid and unconstitutional.

Under the Articles of Confederation it was the constant effort of each member of the Confederation to attempt by legislation to impose a burden upon those residing outside of its boundary, and upon articles produced beyond its territory, which would give an advantage to its own residents and to goods produced within its own territory, thereby giving advantage to its own citizens and to its own products over those residing elsewhere, and over products of other localities, thereby greatly hindering commerce between the States.

This was one of the potential causes which lead to the Constitution of the United States and to its provisions which we are now considering.

It is maintained that if there is any discrimination between a resident and a non-resident manufacturer, or if there is any discrimination in a tax which is imposed on account of the place of growth of products and material or of manufacture, that in either case there is discrimination, and the law is unconstitutional and void.

In the instant case it is not denied that under the construction placed upon this statute by the Supreme Court of Appeals of Virginia, there is no discrimination against manufacturers because they do not have their residence in the State of Virginia, but it is maintained that there is a discrimination against goods which are not manufactured in Virginia, in favor of goods which are manufactured therein, in this, that where goods are manufactured in the State of Virginia the manu-

facturer may sell them at the place at which they are manufactured without any merchant's license tax for so doing, and that it is a matter of common knowledge that the greater part of manufactured goods are thus sold.

The result of this legislation is that a resident manufacturer being taxed on his capital in Virginia has the right to sell, and does sell, the great bulk of his manufactured products without paying any merchant's license therefor, whereas the manufacturer who undertakes to sell goods not manufactured in Virginia, must pay the merchant's license tax on all such sales.

The principles announced above have been decided by the Supreme Court of Appeals of Virginia in the case of *Commonwealth* vs. *Myer*, 92 Va. 809. The syllabus of the case is in part as follows:

> "But where any injurious discrimination is made in favor of the resident against the non-resident, or with respect to the sales of articles manufactured in this state over similar articles manufactured abroad, the law is repugnant to the Constitution of the United States and therefore void. Applying these principles to Sec. 32 of Chap. 244, Public Acts 1889 and 1890, p. 197, the said section is void because it injuriously discriminates against the products of other states and the rights of other citizens, and is an attempt to fetter commerce among the states, and deprives the citizens of other states of the privileges and immunities possessed by the citizens of this State."

The same learned judge who delivered the opinion in the instant case, delivered the opinion in that case, from which the following is an extract:

> "The right of the state to impose a license tax upon peddlers, where it operates uniformly upon

all citizens, and does not discriminate in favor of citizens of Virginia as against citizens of other states, or where the tax imposed is in the exercise of the police power, and is not a regulation of commerce under cover of that power, although incidentally it may have that effect, has been uniformly maintained; but where any injurious discrimination is discovered in favor of the resident as against the nonresident, or *with respect to the sales of articles manufactured in this State over similar articles manufactured abroad, the State* laws are declared to be void, as repugnant to the Constitution of the United States." (Italics ours.)

It is maintaed that in the instant case there is injurious discrimination with respect to the sale of articles manufactured in this State over similar articles manufactured abroad.

There is a long line of decisions of this court, holding any statute which injuriously discriminates between the articles manufactured in a state over similar articles manufactured abroad, unconstitutional and void.

In *Woodruff* vs. *Parham*, 8 Wall. 123, the court said:

"The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alabama. But a law having such operation would, in our opinion, be an infringement of the provisions of the Constitution, which relates to those subjects, and therefore void."

In *Hinson* vs. *Lott*, 8 Wall. 148, the court said:

> "If this section stood alone in the legislation of Alabama on the subject of taxing liquors, the effect of it would be that all such liquors brought into the State from other States and offered for sale, whether in the original casks by which they came into the State or by retail in small quantities, would be subject to a heavy tax, while the same class of liquors manufactured in the State would escape the tax. It is obvious that the right to impose any such discriminating tax, if it exist at all, cannot be limited in amount, and that a tax under the same authority can as readily be laid which would amount to an absolute prohibition to sell liquors introduced from without, while the privilege would remain unobstructed in regard to articles made in the State. If this can be done with reference to liquors, it can be done with reference to all the products of a sister State, and in this mode one State can establish a complete system of non-intercourse in her commercial relations with all the other States of the Union."

In *Ward* vs. *Maryland*, 12 Wall. 418, the constitutionality of a Statute of Maryland was involved, making it a penal offense for a person who was not a permanent resident of that State, to sell within the City of Baltimore any goods whatever other than agricultural products and articles manufactured in the State of Maryland, without first obtaining a license to do so.

After referring to some of the former decisions, the court said:

> "Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax

discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license; which must be paid by the consumer or by the seller himself; and in either event, the amount charged is equivalent to a direct tax upon the goods or commodities."

In *Welton* vs. *State of Mo.*, 91 U. S. 275, the question was the validity of a statute of Missouri, declaring that any one who shall deal in certain articles, while going from place to place to sell the same, shall be deemed a peddler, and requiring a license of him, but no license was required for selling in the same way the products or manufactures of the State.

The constitutionality of this statue was sought to be maintained upon the ground that it was a tax upon a calling.

The court, in its opinion, says:

"So, in like manner, the license tax exacted by the State of Missouri from dealers in goods which are not the product of manufacture of the State, before they can be sold from place to place within the State, must be regarded as a tax upon such goods themselves; and the question presented is, whether legislation thus discriminating against the products of other States in the conditions of their sale by a certain class of dealers, is valid under the Constitution of the United States."

Again the court says:

"The power of the State to exact a license tax of any amount being admitted, no authority would

remain in the United States or in this court to control its action, however unreasonable or oppressive. Imposts operating as an absolute exclusion of the goods would be possible, and all the evils of discriminating State legislation, favorable to the interests of one State and injurious to the interests of other States and countries might follow," etc.

The court held the legislation of Missouri to be unconstitutional.

In *Guy* vs. *Baltimore*, 100 U. S. 434, the court, in its opinion, says:

> "In view of these and other decisions of this court, it must be regarded as settled that no State can, consistently with the Federal Constitution, impose upon the products of other States, brought therein for sale or use, more onerous public burdens or taxes than it imposes upon transportation thereto, of the products of other States, or upon citizens because engaged in the sale therein, or the like products of its own territory. If this were not so, it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired."

The case of *Webber* vs. *Virginia*, 103 U. S. 344, involved the validity of a statute of Virginia providing that "any person who shall sell, or offer for sale, the manufactured articles or machines of other states or territories, unless he be the owner thereof and taxed as a merchant, or take orders therefor, on commission or otherwise, shall be deemed to be an agent for the sale of manufactured articles of other states and territories, and shall not act as such without taking out a license therefor."

The statute required a license of an agent for the sale of any such manufactured articles, or if he sold such articles in other counties or corporations, it required an additional tax in each county or corporation, but it only required persons other than resident manufacturers, or other agents *selling articles manufactured in this State*, to pay a license tax. The court, in its opinion, said:

> "By these sections read together, we have this result: The agent for the sale of articles manufactured in other States must first obtain a license to sell, for which he is required to pay a specific tax for each county in which he sells or offers to sell them; while the agent for the sale of articles manufactured in the State, if acting for the manufacturer, is not required to obtain a license or pay any license tax. Here there is a clear discrimination in favor of home manufacturers and against the manufacturers of other States. A tax upon their agents when thus engaged is, therefore, a tax upon them, and if this is made to depend upon the foreign character of the articles, that is, upon their having been manufactured without the State, it is to that extent a regulation of commerce in the article between the States. It matters not whether the tax be laid directly upon the articles sold or in the form of license for their sale. If by reason of their foreign character, the State can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with home products. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several States."

In *Walling* vs. *Michigan*, 116 U. S. 446, the question was as to the validity of certain legislation in Michigan which it was contended discriminated against the manufactured products of other states.

The court held the Michigan statute to be invalid, and in its opinion, said:

> "It is suggested by the learned judge, who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the act of 1875 is an exercise by the legislature of Michigan of the police powers of the State for the discouragement of the use of intoxicating liquors, and the preservation of the health and morals of the people. This would be a perfect justification of the act if it did not discriminate against the citizens and products of other States in a matter of commerce between the States, and thus usurp one of the prerogatives of the national legislature. The police power cannot be set up to control the inhibitions of the Federal Constitution, or the powers of the United States Government created thereby. * * *.
>
> "Another argument used by the Supreme Court of Michigan in favor of the validity of the tax, is, that it is merely a tax on an occupation which it is averred the State has an undoubted right to impose * * *.
>
> "None of these cases, however, sustain the doctrine that an occupation can be taxed if the law is so specialized as to operate as a discriminative burden against the introduction and sale of the products of another State, or against the citizens of another State."

It is maintained that this long line of decisions establishes beyond peradventure that all statutes are invalid and unconstitutional where there is any discrimination in the tax imposed on account of the place of growth of products and material, or of manufacture.

While the above cited cases seem to establish the principle maintained the case of *Brimmer* vs. *Rebman*, 138 U. S. 78, applies this principle in a case where the facts are very similar to those in the instant case. The syllabus in the case is as follows:

> "A statute of Virginia, entitled 'An act to prevent the selling of unwholesome meat,' * * * declares it to be unlawful to offer for sale within the limits of that State, any beef, veal or mutton, from animals slaughtered one hundred miles or more from the place at which it is offered for sale, unless it has been previously inspected and approved by local inspectors appointed under that act. It provides that the inspector shall receive as his compensation one cent per pound to be paid by the owner of the meats. The act does not require the inspection of fresh meats from animals slaughtered within one hundred miles from the place in Virginia at which such meats are offered for sale. HELD, that the act is void, as being in restraint of commerce among the States, and as imposing a discriminating tax upon the products and industries of some States in favor of the products and industries of Virginia.
>
> "The owner of meats from animals slaughtered one hundred miles or over from Virginia has the right to compete in the markets of that State upon terms of equality with the owner of meats from animals slaughtered in that State or elsewhere, within one hundred miles from the place at which they are offered for sale.
>
> "The principle reaffirmed that, independently of any question of intent, a State enactment is void, if, by its necessary operation, it destroys rights granted or secured by the Constitution of the United States."

The court, in its opinion, says:

> "The recital in the preamble that unwholesome meats were being offered for sale in Virginia, can-

not conclude the question of the conformity of the act to the constitution. 'There may be no purpose,' this court has said, 'upon the part of a legislature to violate the provision of that instrument, and yet a statute enacted by it, under the forms of law, may, by its necessary operation, be destructive of rights granted or secured by the Constitution;' in which case 'the courts must sustain the supreme law of the land by declaring the statute unconstitutional and void.' *Minnesota* vs. *Barber*, 136 U. S. 313, 319, and authorities there cited."

Again the court, in its opinion, said:

"Undoubtedly, a State may establish regulations for the protection of its people against the sale of unwholesome meats, provided such regulations do not conflict with the powers conferred by the constitution upon Congress, or infringe rights granted or secured by that instrument. But it may not, under the guise of exerting its police powers, or of enacting inspection laws, make discriminations against the products and industries of some of the States in favor of products and industries of its own or of other States."

Again the court said:

"Nor can this statute be brought into harmony with the Constitution by the circumstance that it purports to apply alike to the citizens of all the States, including Virginia; for 'a burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute.' *Minnesota* vs. *Barber*, above cited; *Robbins* vs. *Shelby Taxing District*, 120 U. S. 489, 497. If the object of Virginia has been to obstruct the bringing into that State, for use as human food, of all beef, veal

and mutton, however wholesome, from animals slaughtered in distant States, that object will be accomplished if the statute before us be enforced."

Again the court said:

> "The case, in principle, is not distinguishable from *Minnesota* vs. *Barber*, where an inspection statute of Minnesota, relating to fresh beef, veal, mutton, lamb and pork, offered for sale in that State, was held to be a regulation of interstate commerce and void, because, by its necessary operation, it excluded from the markets of that State, practically all such meats—in whatever form, and although entirely sound and fit for human food—from animals slaughtered in other States."

The Supreme Court of Appeals of Virginia attempted to bring this Sec. 45 into harmony with the Constitution of the United States, by the fact that it purports to apply as well to resident manufacturers who do not sell their wares at the place of manufacture, as to non-resident manufacturers, and it is upon this proposition that the decision of the court of last resort in Virginia is based, a position which is declared to be unsound and not to save the constitutionality of the act by the decision of this court in the above case.

This case holds that the constitutionality of a statute is not determined by the fact that it applies to residents as well as non-residents, *but by its practical operation*, although there may be no purpose upon the part of the legislature to violate the provisions of the constitution.

It is maintained that the practical operation of Sec. 45 of the tax bill imposes a merchant's license tax on non-resident manufacturers upon the sale of their wares in Virginia, and does not impose a tax on a resi-

dent manufacturer who sells at the place of manufacture, where the great bulk of his wares are sold. It further appears that this statute was amended to meet the decision of the Supreme Court of Appeals of Virginia, which held that a non-resident pork packer was not liable for a merchant's license tax on articles manufactured by it outside of Virginia and sold or offered for sale in Virginia.

This case has been cited with approval, and authority for the principles by it established in the following decisions of this court:

Voight vs. *Wright*, 141 U. S. 62;
Brennan vs. *Titusville*, 153 U. S. 289;
Plumley vs. *Mass.*, 155 U. S. 461;
Austin vs. *Tenn.*, 179 U. S. 343;
Smith vs. *St. Louis & S. W. Ry. Co.*, 181 U. S. 248;
Darnell & Son vs. *Memphis*, 208 U. S. 113;
Foote vs. *Maryland*, 232 U. S. 494.

In *Darnell & Son* vs. *Memphis*, *supra*, the question was the validity of a statute of Tennesse which exempted logs in the hands of a manufacturer awaiting conversion into lumber, and the lumber made therefrom in the hands of the manufacturer when cut from Tennessee soil, but imposing a tax upon them when cut from other soil.

The court, in delivering the opinion in that case, says:

> "The principle applied in the foregoing cases was also given effect in *Minnesota* vs. *Barber*, 136 U. S. 313; *Brimmer* vs. *Rebman*, 138 U. S. 78, and *Voight* vs. *Wright*, 141 U. S. 62, and so-called inspection laws of various States were held to be repugnant to the commerce clause of the Constitution

because of their discriminating character. In *New York* vs. *Roberts*, 171 U. S. 658,, while the tax there considered, imposed by New York upon a corporation of another State, was sustained as a valid tax upon the franchise of doing business as a corporation in New York, the court reaffirming the authority of its former decisions declaring the invalidity of all taxes of a discriminating character levied by a State upon the products of other States."

None of these cases are referred to in the opinion of the Supreme Court of Appeals of Virginia in this case, but all are ignored, and its decision is based upon *New York* vs. *Roberts*, 171 U. S. 658; *Plummer* vs. *Coler*, 178 U. S. 115, and *Reymann Brewing Co.* vs. *Brister*, 179 U. S. 445, as if these cases overruled *Brimmer* vs. *Rebman*, *supra*, and decisions establishing the same principle prior to that case and subsequent to it, as well as those subsequent to the three cases relied upon by the Virginia court.

In discussing the claim that Sec. 45 of the tax bills does not apply to manufacturers taxed on their capital by Virginia, who offer for sale at the place of manufacture, goods manufactured by them, is a discrimination against a foreign manufacturer, because having no place of manufacture within the State he cannot have the advantage of the exemption which is employed by the domestic manufacturer, the court says:

"This point was disposed of by the Supreme Court of the United States in the case of *New York* vs. *Roberts*, 171 U. S. 658. In that case a statute of New York was construed which required every corporation organized under the laws of New York, or any other State or country, and doing business in New York, except certain companies, including manufacturing corporations wholly engaged in carry-

ing on manufacture within the State, to pay into the State treasury annually a tax upon its business based upon the amount of the capital stock actually employed within the State. * * *

"The name being changed the law as there declared is, we think, precisely applicable to the case in hand."

There is no effort whatever to reconcile that case with *Brimmer* vs. *Rebman*, which was reaffirmed as we have seen, in *Darnell & Son* vs. *Memphis, supra*, a much later case than *New York* vs. *Roberts*.

The constitutionality of the tax in *New York* vs. *Roberts* was sustained because, as stated, in the last named case it was a "tax upon the franchise of doing business as a corporation in New York," and that is the ground of the decision and the distinction between that case and the instant case.

In the case at bar, it is not maintained that Sec. 45 of the tax bill is unconstitutional because there is any discrimination between residents of Virginia and non-residents, there being none, and the extent of the decision in *New York* vs. *Roberts* is that where there is no discrimination because of residence, that the franchise tax upon a corporation for doing business in New York, which applies alike to resident and non-resident corporations, is constitutional and valid.

The constitutionality of Sec. 45 is to be determined by its actual operation, although there may be no purpose on the part of the legislature to violate the provisions of the constitution. The practical operation of Sec. 45 imposes a merchant's license tax on non-resident manufacturers upon the sale of their wares in Virginia, and does not impose a tax upon the resident manufacturer who sells at the place of manufacture, where

the great bulk of his wares are sold. Furthermore, the statute was amended to meet a decision of the Supreme Court of Appeals of Virginia which held that a non-resident pork packer was not liable for a merchant's license tax on articles manufactured by it outside of Virginia and sold or offered for sale therein.

The case of *Plummer* vs. *Coler, supra,* was a case involving the question whether, under the inheritance tax laws of the State of New York, a tax may be validly imposed on a legacy consisting of United States bonds issued under a statute declaring them to be exempt from state taxation in any form. The court holds that the right to take property by will or descent is derived from and regulated by municipal law, and that the State may lawfully measure the tax by referring to the value of the property passing, and the fact that such property is composed in whole or in part of Federal securities does not invalidate the State tax, or the law under which it is imposed.

A quotation from *New York* vs. *Roberts,* made in that case, is to the effect that the tax therein was not invalid because a portion of the capital consisted of imported goods in original packages, because in that case no tax was sought to be imposed directly on imported articles or on their sale, but that the tax was a tax upon the franchise of doing business as a corporation.

The case of *Reymann Brewing Co.* vs. *Brister, supra,* was a case in which the Ohio Dow liquor law, which levies a tax upon liquors sold, except those manufactured from raw material, and the sale thereof at the manufactory, by the manufacturer, in quantities of one gallon or more at any one time. The court holds that the Dow law is within the scope of the police power of the State and does not discriminate between foreign and domestic

dealers. The opinion cites *N. Y.* vs. *Roberts* as authority for the latter proposition. It is maintained that this case is not applicable to the case at bar. The court distinctly holds that the Dow law, in exempting sales in quantities exceeding one gallon at the place of manufacture, and in imposing a tax upon such sales when made elsewhere, "the legislature of Ohio was in the exercise of its police power aiming to restrict the evils of saloons or places where liquors are drunk." The measure draws a line between a distillery and a brewery on the one hand, and a saloon on the other.

It is maintained that none of these cases sustain the opinion of the Supreme Court of Appeals in the instant case and that none of them overrule or in anywise change the law as held in the case of *Brimmer* vs. *Rebman, supra*, referred to with approval in a number of subsequent cases and especially in the case of *Darnell & Son* vs. *Memphis, supra.*

It is maintained that Sec 45 in its practical operation as construed by the Supreme Court of Appeals of Virginia, does discriminate against goods manufactured outside of the State of Virginia, and in favor of goods manufactured in Virginia and sold at the place of manufacture.

It is further maintained that a very small amount of manufactured products are sold by the manufacturer at a place other than the place of manufacture, and that the practical operation of Sec. 45 is, therefore, to impose this tax upon the sale of goods manufactured outside of Virginia and not to impose it upon the sale of goods manufactured in the State of Virginia.

That this conclusion is strengthened by the fact found by the Supreme Court of Appeals of Virginia in its opinion that the amendment of Sec. 45 was to meet

the decision of that court in the case of *Morris & Co.* vs. *Commonwealth*, in which a non-resident pork packing company was held not to be liable to a merchant's license tax for products manufactured by it outside of the State of Virginia and sold or offered for sale within the State.

For these reasons it is maintained that Sec. 45 of the tax bill is discriminatory, unconstitutional and void, and that the decision of the Supreme Court of Appeals of Virginia should be reversed.

Respectfully submitted,

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Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1917

No. 127

ARMOUR & COMPANY,

v.

COMMONWEALTH OF VIRGINIA.

In Error to the Supreme Court of Appeals of the Commonwealth of Virginia.

Brief on Behalf of The Commonwealth of Virginia.

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SUBJECT INDEX.

Page No.

Statement of the Case and issue 3
Contention of plaintiff-in-error 6
Argument 6
Consideration of cases relied on by plaintiff-in-error..... 32
Statute in Issue 3
Section 45 Virginia Tax Law..... 3-4
Section 46 Virginia Tax Law..... 6-7
Section 8 Virginia Tax Law..... 8-9
Section 143 Virginia Tax Law..... 12

CASES REFERRED TO.

American Steel Wire Co. *v.* Speed, 192 U. S. 500..... 15
Brimmer *v.* Rebman, 138 U. S. 78.....31, 36, 37
Brown *v.* Maryland, 12 Wheat. 419, 6 L. Ed. 678..... 25
Commonwealth *v.* Moore, 66 Va. 951..... 15
Commonwealth *v.* Myer, 97 Va. 809..... 33
Commonwealth *v.* U. S. Cig. Machine Co., 119 Va. 447..... 9
Consumers Brew. Co. *v.* Norfolk, 101 Va. 171..... 15
Darnell *v.* Memphis, 208 U. S. 213.....38, 39
Guy *v.* Baltimore, 100 U. S. 434..... 34
Hinson *v.* Lott, 8 Wall. 143..... 31
Horne Silver Mining Co. *v.* N. Y., 143 U. S. 305, 315, 36 L. Ed., 164, 168 (1892) 13
Maine *v.* Grand Trunk R. R. Co. of Canada, 142 U. S. 217.... 21
Minnesota *v.* Barber, 136 U. S. 313..... 23
New York *v.* Roberts, 171 U. S. 658,
5, 11, 22, 24, 25, 28, 30, 31, 32, 36, 37, 39
People, Blackington & Co. *v.* Roberts, 4 App. Div., 388..... 24
Plummer *v.* Coler, 178 U. S. 115..... 24
Reymann Brew. Co. *v.* Brister, 179 U. S. 445..25, 29, 31,, 32, 37, 39

Page No.

Robbins *v.* Shelby County Taxing Dist., 120 U. S. 489..... 23
Sou. Rwy. Co. *v.* Green, 216 U S. 400..... 25
Walling v. Mich., 116 U. S. 446.....23, 31, 36
Ward *v.* Maryland, 12 Wall. 418..... 33
Webber *v.* Virginia, 103 U. S. 334..... 35
Welton *v.* Missouri, 91 U. S. 279..... 34
Woodruff *v.* Parham, 8 Wall. 123..... 32

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BRIEF ON BEHALF OF THE COMMONWEALTH OF VIRGINIA.

STATEMENT OF THE CASE AND THE ISSUE.

The history of this case narrated in the brief of the plaintiff in error, is correct, and it will be unnecessary to re-state it.

Section 45 of the Virginia Tax Bill (Acts of Assembly of Virginia, 1915, Chapter 148, p. 233; Virginia Code, Vol. 4, p. 594) provides as follows:

> "Every person, firm, company or corporation engaged in the business of a merchant shall pay a license tax for the privilege of doing business in this State to be graduated by the amount of purchases made by him during the period for which the license is granted, and all goods, wares and merchandise manufactured by such merchant and sold or offered for sale, in this State, as merchandise, shall be considered as

purchases within the meaning of this section; provided, that this section shall not be construed as applying to manufacturers taxed on capital by this State, who offer for sale at the place of manufacture, goods, wares and merchandise manufactured by them. To ascertain the amount of purchases it shall be the duty of such merchant, on the first day of April of each year, or within ten days thereafter, to make report in writing, under oath, to the commissioner of the revenue, for the district for which he was licensed, showing purchases as above defined, and also all goods, wares and merchandise manufactured and sold or offered for sale in this State during the next preceding twelve months; except such goods, wares and merchandise as is manufactured by persons, firms and corporations taxed on their capital by this State. The form of the report required by this section shall be prepared by the auditor of public accounts and furnished to each commissioner of the revenue, and by him distributed to each licensed merchant; and each commissioner shall, in the mode prescribed for making such report by him of the violations of the revenue law, report every merchant who shall fail to comply with the requirements of this section. Any person violating the provisions of this section shall pay a fine of not less than thirty dollars, or more than one thousand dollars for each offense."

The Supreme Court of Appeals of Virginia has construed this section to mean that any manufacturer, whether resident or non-resident, engaged in business in Virginia, who is taxed on the capital employed in his business, may, without a merchant's license, sell, at the place of manufacture, but nowhere else, the articles manufactured by him, but that, if either a non-resident manufacturer or a resident manufacturer desires to sell the goods, wares and merchandise manufactured by him, at a different place or store than the place of manufacture, then such manufacturer, whether resident or non-resident, must take out a merchant's license; and that where *any* manufacturer establishes a place or store for sale of his goods other than the place of manufacture, the amount of his license is to be graded, not only by the amount of purchases made by the manufacturer from other manufacturers, but also

by the goods, wares and merchandise manufactured by him and sent from the place of manufacture, *wherever located*, to his store for sale; and he is required to report to the commissioner of revenue, not only the amount of goods purchased by him from other manufacturers and offered for sale, but also the amount of goods manufactured by him either *without or within the State of Virginia*, and offered for sale by him at his store or definite place of sale in Virginia other than the place of manufacture. (Opinion of Keith, P., R. pp. 59 and 65).

It will be noted that under this construction, the necessity of securing a merchant's license by a manufacturer selling goods manufactured by him, depends, not upon his residence nor *upon where the goods are manufactured*, but entirely upon *where the goods are to be sold;* that a *non-resident manufacturer establishing a place of manufacture in this State and taxed by this State on his capital employed in that business, has the same privilege to sell at his place of manufacture as a manufacturer who is a resident of this State.* Again, a resident manufacturer as well as a non-resident manufacturer, must take out a merchant's license if he desires to sell the goods, wares and merchandise manufactured by him at any place other than the place where goods are manufactured. It makes no difference whether goods are manufactured in Virginia or some other State. The statute in question, as construed by the Supreme Court of Appeals of Virginia, compels the taking out of a merchant's license if the goods are sold at any other place than the place of manufacture, and this is so even though the place or store be located in the same city or town in which the place of manufacture is established.

The construction put upon this statute by the Supreme Court of Appeals of Virginia, is binding upon this court. (*New York* v. *Roberts*, 171 U. S. 658, 43 L. Ed. 323) and this is admitted by plaintiffs in error. (Brief of plaintiffs in error, p. 7).

The question before the court, therefore, is whether or not Section 45 of the Virginia Tax Bill construed as above set out, is repugnant to the Constitution of the United States.

of the tobacco sold or offered for sale, desiring to retail tobacco, cigars, snuff, smoker's supplies, et cetera, shall be licensed as a merchant under the provisions of this section and section forty-five.

If the license required by this section and section forty-five when first issued cannot run for an entire license year, because part of the license year has expired, then the license shall be issued for the residue of the license year, and the tax to be paid shall bear such proportion to the whole annual tax as the residue of the license year bears to the entire license year; unless the annual tax on the license be as much as fifty dollars or over, in which case the tax may be paid quarterly or for the residue of the quarter in which the license was taken out and the tax for the license shall be apportioned accordingly."

In order to intelligently treat the question in issue, it is necessary to consider to some extent, the system of taxation adopted by Virginia, so far as it relates to the taxation of manufacturers and merchants.

It is provided by the Virginia Tax Bill, Section 3 (Virginia Code, 1904, p. 2191) that taxable subjects shall be classified by schedules, and then follows the various schedules, none of which are pertinent to the issue here except Schedule "C" which embraces intangible personal property. Under Schedule "C," which is Section 8 of the Virginia Tax Bill, intangible property is classified under eight heads, the only sub-division pertinent to the question in issue in this case, being sub-divisions three and four, which read as follows (Acts of Assembly of Virginia, 1915, p. 161):

"Third: All capital of corporations, or incorporated joint stock companies not otherwise taxed; and when all of such capital is taxed by this State, the shares of such stock in the hands of individual shareholders shall not be further taxed for State purposes; but real estate belonging to such corporations and companies shall not be held to be capital, but shall be listed and taxed as real estate.

Fourth: All capital of individuals invested, used or employed in any trade or business not otherwise taxed. Moneys

and credits actively used and employed in carrying on the trade or business, materials, goods, wares and merchandise on hand and all solvent bonds, notes, demands or claims made or contracted in the course of business during the preceding year (but not including any moneys on hand received from loans made for a period of not more than four months, which shall be owing and shall have been actually contracted for the necessary conduct of such business) shall be held to be capital in such trade or business, and shall not be taxed otherwise than as such capital; but real estate shall not be listed as such capital, but shall be listed and taxed as real estate; provided, however, that nothing herein shall prevent cities and towns of this Commonwealth from imposing a license tax on merchants, mercantile firms or corporations, based on their purchases or otherwise, in pursuance of their respective charters or general laws of the State for the government of cities and towns."

It is under these sections that individuals or corporations doing a manufacturing business in Virginia are taxed.

So far as Section 8 of the Virginia Tax Bill is pertinent to this case, it is the same as it was in 1908, and has been construed by the Supreme Court of Appeals of Virginia in a well considered opinion delivered by Judge Cardwell in *Commonwealth* v. *United Cigarette Machine Co.*, 119 Va. 447 (1916). The court said (p. 468):

> "An analysis of our tax laws shows that taxable subjects may be classified as follows: First, lands, lots and improvements thereon, ground rents and rent charges; second, persons and personal property, which second subject is sub-divided as follows: Schedule A, embracing male inhabitants twenty-one years of age: Schedule B, embracing tangible personal property, and Schedule C, embracing intangible personal property. This case calls for a correct construction of Schedule C, section 8, of the tax bill, as amended Acts 1908, ch. 213, p. 322. (Pollard's Supplement, 1910, p. 509.) Under Schedule C, as amended, there are seven classifications of intangible property. The first sub-division, to-wit, 'bonds, notes and other evidences of debt,' etc., is the general head ad-

dressed to individuals and corporations not engaged in such a business that the tax is required to be on the capital of the business, but persons or corporations engaged in a manufacturing business are not usually taxed under this class. The second sub-division, namely, 'all capital of individuals including moneys, credits, or other thing loaned, used or employed out of this State,' applies to an individual who is engaged in business in this State and who may also carry on a business out of this State. The third sub-division is: 'Capital' of incorporated joint stock companies not otherwise taxed; and when all 'of such capital is taxed by the State of Virginia, the shares of stock in the hands of individual shareholders shall not be further taxed for State purposes; but real estate belonging to such companies shall not be held to be capital, but shall be listed and taxed as property, and not as capital.' This section section clearly applies to corporations, whether foreign or domestic, which are engaged in such a business in the State of Virginia that the State would tax its capital, except that *it does not apply to a corporation in the mercantile business, for the reason that a corporation, whether domestic or foreign, engaged in Virginia, in a mercantile business, pay a license tax based upon its purchases; but if a corporation be engaged in Virginia, in a manufacturing business, then such a corporation is not otherwise taxed, and this section is applicable to such a corporation.* Sub-division fourth relates to 'capital of individuals invested, used or employed in any trade or business not otherwise taxed,' and clearly would embrace both residents and non-residents who engage in this State in a business of such nature that a tax on the capital used in the business—that is to say, *if an individual, either resident or non-resident, and corporations, domestic or foreign, doing in this State, business as manufacturers or other business, where a license is not in lieu of tax on capital,* and it is to be observed that in the second, third and fourth sub-sections of Section 8, Schedule C, the word 'capital' is used, and the fourth sub-section gives its definition as follows: 'Moneys and credits actively used and employed in carrying on the trade or business, materials, goods, wares and merchandise on hand and all solvent bonds, notes, demands or claims made or contracted in the course of such business during the preceding year, shall be held to be

capital in such business and shall not be taxed *otherwise than as such capital* * * *." (Italics ours).

It is readily seen from this construction of Section 8 of the Virginia Tax Bill, which is binding on this court (*New York* v. *Roberts*, 171 U. S. 658, 43 L. Ed. 323) that a corporation or individual engaged in a manufacturing business is taxed on the capital employed in such business because it is not "otherwise taxed," and the capital so taxed is not "taxed otherwise than as such capital." Thus whether a person or corporation be a resident or non-resident of Virginia, when he engages in the business of manufacturing in that State, he pays a tax on the capital employed in this business, and such capital is not otherwise taxed.

On the other hand, the object of Sections 45 and 46 of the Virginia Tax Bill is to classify and grade *merchants* for the purpose of taxation, and the basis of classification adopted is the amount of purchases. Where the purchases do not exceed $1,000.00, the amount of the fee required is $5.00; where they exceed $1,000.00 and do not exceed $2,000.00, the amount is $10.00; for all purchases over $2,000.00 and less than $100,000.00, the fee is twenty cents on the hundred dollars, and upon all purchases over $100,000.00, the fee is ten cents on every hundred dollars in excess of $100,000.00. It is manifest that the law in question does not make any distinction between resident and non-1resident merchants; nor does it make any distinction on account of the place where the purchases are made, whether from home manufacturers or from non-resident manufacturers; nor does it make any distinction between a merchant who is a manufacturer in Virginia and a merchant who is a manufacturer outside of Virginia and establishes a place of business for the sale of his goods in Virginia. Nor does it distinguish between the purchase of goods which were manufactured in the State and the purchase of goods which were manufactured outside of the State. *A merchant's license is required of all alike who sell goods wherever manufactured*, unless they are sold at the place of manufacture.

It will thus be observed that under the system of taxation promulgated in Virginia, the person engaged in the business of manufacturing, whether he be a citizen or non-resident, is taxed upon the capital employed by him in that business, while the person—and when we say person we mean, of course, individual, or corporation—engaged in this State in the mercantile business, whether he be a citizen or a non-resident, is taxed on his purchases, and such purchases include goods manufactured by him, but disposed of by him while carrying on his business of merchant.

Section 143 of the Virginia Tax Laws (Virginia Code, 1904, p. 2265) provides:

> "When any incorporated company, firm or person is engaged in more than one business, which is made by the provisions of this act subject to taxation, such incorporated company, firm, or person shall pay the tax provided by law on each branch of its or her business."

Under this provision, where one conducts both a manufacturing business and a mercantile business, he must pay both a tax on his capital as other manufacturers do, and a license tax on his purchases as other merchants do.

Reading Section 45 in the light of the other sections of the Virginia Tax Bill above referred to, it is manifest that the intention of this section is to *class as a manufacturer any person who only sells the goods manufactured by him at the place of manufacture*, and, thus, where one pays taxes as a manufacturer on the capital employed by him in that business, this includes the right of such manufacturer to sell the goods produced by him at the place of manufacture without further tax, the law deeming such sale as included in the business of manufacture. In other words, where the manufacturer pays on the capital invested by him, this gives him the privilege of selling at his place of manufacture, the goods so manufactured by him; but if he wishes to establish a store for the sale of his goods other than the place of manufacture, he thereby becomes a merchant and therefore

must also take out a merchant's license. On the other hand, by the terms of Section 46, it is provided that the license tax required by that section shall be "in lieu of all taxes for State purposes on the capital actually employed by said merchant, or mercantile firm or corporation in said business."

If one is a manufacturer alone, he is taxed on the capital employed by him and this is in lieu of any other tax thereon. If he is a merchant, he is taxed on his purchases and this is in lieu of any tax on the capital invested, and if he is both a manufacturer and a merchant, he is taxed on the capital employed as a manufacturer and on the purchases made as a merchant, and he is not allowed to evade taxes based on his purchases by sending to his store the products of his manufacturing plant.

There can be no injustice, discrimination or complaint made because the laws of Virginia require the same person to pay different kinds of taxes for different kinds of occupations, and so long as the law is applicable alike to resident and non-resident merchants and resident and non-resident manufacturers there would seem to be no just ground for the claim that the law is discriminatory. On the other hand, if a non-resident manufacturer is not required to return his purchases for graduation as a merchant, then non-resident manufacturers might come into the State of Virginia and open stores throughout the State for the sale of their products without paying any merchant's license tax therefor, thus gaining a distinct advantage over the resident merchants. As was said by this Honorable Court in *Horne Silver Mining Co.* v. *New York*, 143 U. S. 305, 315, 36 L. Ed. 164, 168 (1892) "it does not lie in any foreign corporation to complain that it is subjected to the same law with the domestic corporation."

The object of Section 45 of the Virginia Tax Bill manifestly is to reach all manufacturers who are also merchants and to protect all manufacturers who do not engage in the business of merchants in competition with other merchants. Such an object surely cannot be repugnant to the Constitution of the United States.

So long as a manufacturer sells his products at his manufacturing plant, he is not deemed a merchant, but a manufacturer. But just as soon as he establishes a place apart from his place of manufacture to dispose of his products, he is deemed a merchant, and this classification applies to citizens as well as to non-residents. There is no distinction between the two. When the resident of any State comes into Virginia to do business, he has a perfect right to establish a place of manufacture here and pay a tax upon the capital employed by him, and sell his products at such plant without being subjected to a merchant's license. But if he prefers only to establish a place to *sell* his products and he is obliged to pay a merchant's license just as resident manufacturers establishing such places do, he surely cannot complain that there is an unjust discrimination in favor of resident manufacturers.

It is now necessary to apply this scheme of taxation to the case of the plaintiff in error to ascertain whether the scheme in any way violates *his rights* under the Constitution of the United States.

The plaintiff in error, a corporation, is engaged in the manufacturing business outside of the State of Virginia and decided to enter into business in this State for the purpose of disposing of the products of its manufacturing plants, accordingly it established at various points in Virginia, stores where its products are sold. As soon as the plaintiff in error began business in the State, it became liable to pay to the State a proper tax for being permitted to engage in business, for it is too well settled to need the citation of authorities to support the proposition, that a State has a right to place a tax upon all persons and corporations doing business within its confines and securing the protection of its laws, for all persons enjoying the privileges of the State government are liable to contribute to the revenue for its support; and when the plaintiff in error came into Virginia and established a place of business, it became subject to taxation by that State, just as every other corporation engaged in business within its borders. This will hardly be denied by the plaintiff in error.

The question that naturally next arises is what tax it shall pay. Under the Virginia system of taxation, and this is the system which must determine the question where one does business in Virginia, the plaintiff in error must fall under one or two classes. He is either engaged in the manufacturing business or the mercantile business. If engaged in the former, he must pay on the capital employed, if in the latter, than on his purchases. But he is not a manufacturer, as the word is used in the Virginia Tax Law, because the place where the goods are sold is not the place they are manufactured. Furthermore, as defined by the Supreme Court of Appeals of Virginia in *Consumers Brewing Co.* v. *Norfolk*, 101 Va. 171, 173 (1903) "a manufacturer is one who is engaged in the business of working raw material into wares suitable for use," and the plaintiff is not engaged in such business in Virginia.

But it *is* engaged in the business of offering for sale in Virginia, at a place other than the place of manufacture, the goods, wares and merchandise manufactured by it, and, therefore, under the classification of businesses in Virginia, *it falls under the class known as merchants, it falls under the same class that citizens of Virginia fall who do a like business.* There can still be no cause of complaint by the plaintiff in error that his rights and privileges are not amply protected. The mere determination of who are merchants within the State law involved no Federal question. *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500; 48 L. Ed. 538, 547.

The Commonwealth of Virginia has deemed the just and equitable method of arriving at the proper amount of license tax to be paid by each merchant is to graduate the same by the amount of purchases made by such merchant during the period for which the license is granted. This method of arriving at the tax on merchants received the official sanction of the Supreme Court of Appeals of Virginia, as far back as 1875, in *Commonwealth* v. *Moore, et al*, 66 Va. 951, 25 Gratt. 951, and has been the method employed by that State ever since. Not yet has the plaintiff in error cause of complaint.

In defining purchases, the law includes goods, wares and merchandise manufactured by such merchant and "*sold or offered for sale*" at the store established for that purpose. In other words, the State of Virginia deems it only fair that, when a manufacturer opens up a store to "sell or offer for sale" his manufactured products, as he thereby becomes also a merchant in competition with other merchants of the Commonwealth, he should bear the same burden that other merchants bear, namely, the payment of a merchant's license. Still, there is no just cause of complaint on the part of the plaintiff in error.

There is only one more step to complete the requirements of the statute under discussion. It excepts from the payment of a merchant's license tax all concerns "carrying on only a manufacturing business in Virginia," because that is after all, the effect of the proviso in question. For, while the statute uses the words "manufacturers' tax on capital by this State," *all* concerns doing a manufacturing business in Virginia, as we have seen, are "taxed on capital by this State." Furthermore, we say "carrying on *only* a manufacturing business" because, while the proviso limits it to concerns "who offer for sale at the place of manufacture." we have seen that when the products of manufacture are sold by their producer at any place than the place of manufacture, such producer, *ipso facto*, ceases, so far as such sales are concerned, to be a manufacturer and becomes a merchant. Thus, we repeat that the proviso in Section 45 only excepts from its operation manufacturers doing only a manufacturing business in the State, and even confines this exception to a manufacturer who is not also a merchant.

We have, then, the gist of the complaint of plaintiff in error. *It claims that the proviso of Section 45, which exempts manufacturers doing only a manufacturing business* in Virginia, from paying a merchant's license, is an unjust discrimination against its goods, because they are not manufactured in Virginia. It claims that to allow a manufacturer to engage in the business of manufacturing—that is to say "work up his raw materials into

wares suitable for use" and dispose of them at his plant—upon the payment of a tax based on the capital employed at such plant, is a discrimination against goods manufactured outside of Virginia. The simple statement of this proposition would seem to prove its absurdity.

Plaintiff in error contends that exempting the concern engaged only in manufacturing in Virginia from also paying a merchant's tax, is a discrimination against the foreign manufacturer because "having no place of manufacture within the State," he cannot have the advantage of the exemption which is enjoyed by the concern who is manufacturing and selling his products at his place of manufacture. But there is no discrimination here. The foreign manufacturer may establish a plant in Virginia and pay on the capital so employed and also be exempted from the payment of a merchant's license tax as a prerequisite to disposing of his products at his plant.

Where a State promulgates a system of taxation which classes its citizens who sell the goods manufactured by them at any place other than the place of manufacture as merchants, and requires them to pay a merchant's license based on the purchases made, including the goods so manufactured by them in the State, but sold at such place, surely it has the same right to require non-residents of the State to pay the same license tax under similar conditions. *This is all that Section 45 of the Virginia Tax Law attempts.*

Plaintiff in error cannot complain that it is not granted the same exemptions granted the manufacturer, because it is not doing a manufacturing business in the State. A because it is not doing a manufacturing business in the State. A merchant who is granted all the exemptions allowed other merchants, certainly has no right to demand that he shall also be granted the exemptions allowed concerns engaged in an entirely different business and taxed on an entirely different basis.

Plaintiff in error contends (Brief of plaintiff in error, p. 9) that "The result of this legislation is that a resident manufac-

turer being taxed on his capital in Virginia, has the right to sell, and does sell, the great bulk of his manufactured products without paying any merchant's license therefor, whereas the manufacturer who undertakes to sell goods not manufactured in Virginia, must pay the merchants's license tax on all such sales."

We submit that this is not the result of the legislation in question, but the result is rather that a manufacturer doing business in Virginia is taxed on his capital and has a right thereby to sell, if he desires, all of his manufactured products at his plant without paying a merchant's license, but that the manufacturer who does not engage in a manufacturing business in Virginia but attempts to engage in the mercantile business, must pay a merchant's license.

This is not a discrimination, but it is a difference of occupation. The Commonwealth surely has the right to distinguish, *and does distinguish*, between the business of manufacturing and the mercantile business. When the concern who is in the manufacturing business in some other State enters Virginia and opens up a store for the sale of his products, the State of Virginia has the right to treat him as she does her own manufacturers who open up such a store, and require him to pay a license tax as a merchant, and where she requires him to return as a basis of taxation the goods shipped from his place of manufacture to his store, she is requiring the same thing of him that she requires of the resident manufacturer, and there is no discrimination.

In this connection, it is proper to note that the manufacturer doing business in this State is bearing his burden towards the support of its government by paying a tax on his capital. Bearing in mind that manufacturers pay on capital employed in lieu of a license tax and merchants pay a license tax in lieu of a tax on the capital employed, we fail to see the force of the contention of plaintiff in error that its goods are being discriminated against because it is not allowed the exemptions accorded to a manufacturer when it enters into the State and engages in the business, not of a manufacturer, but of a merchant and is allowed all the exemptions afforded other merchants.

We submit that, as regards Virginia, the plaintiff in error is not a manufacturer because it is not engaged in such business in this State, and if it were, it would be compelled to pay a tax on the capital employed by it in that business. But it is engaged in business as a merchant and the business of the plaintiff in error so far as concerns Virginia, is not the business in which he engages outside of the State, but the business in which he engages in the State.

The plaintiff in error objects to Section 45 of the Virginia Tax Law necessarily for one of two reasons. Either because manufacturers engaged in business as such in this State are not compelled to pay a license tax or because it, the plaintiff in error, is not allowed to do business in Virginia without paying any tax and on one of these objections it must base its claim of an unjust discrimination against its goods. But we submit that the plaintiff in error cannot successfully base a complaint of discrimination on the ground that persons engaged solely in the business of manufacturing, are not also required to pay a merchant's license, nor can he any more successfully base a claim of discrimination upon the ground that he should be allowed to transact the business in Virginia of merchant without being made to pay the same license tax that other merchants pay. In its final analysis the claim of the plaintiff in error is really that it should be allowed to engage in the business of selling or offering for sale its products in Virginia without paying the license that all other persons carrying on the same business are required to do. In other words, the plaintiff in error would invoke the provisions of the Constitution of the United States to *compel the State of Virginia to make a hostile discrimination against its own citizens and against the products manufactured within its own confines* (not sold at the place of manufacture) *in favor of non-residents and products not manufactured in the State.*

Counsel for the plaintiff in error, in his brief in this case, contends that the constitutionality of the statute is not determined by the fact that it applies to residents as well as non-residents

but by its practical operation. We agree with this, but we cannot agree with the next step taken in the brief that Section 45, as construed by the Supreme Court of Appeals of Virginia, "does discriminate against goods manufactured outside of the State of Virginia and in favor of goods manufactured in Virginia and sold at the place of manufacture." We submit that Section 45 of the Virginia Tax Bill does not work any such discrimination; but, 'in its practical operation" distinguishes between merchants and manufacturers, rather than discriminates against goods manufactured "outside of the State of Virginia." It distinguishes between manufacturers and merchants and defines merchants as those manufacturers who sell their products at any other place than where manufactured. The proof that there is no discrimination against goods manufactured outside of the State of Virginia is conclusively shown by the fact that the concerns selling goods manufactured in the State of Virginia at any place other than the place of manufacture, must pay the same license and graduated upon the same scale as persons selling in the State goods manufactured outside of the State. There is a distinction, it is true, but not a discrimination, and there is a vast difference between a distinction and a discrimination.

Counsel for the plaintiff in error further contends that because a very small amount of the manufactured products are sold by the manufacturer at a place other than the place of manufacture, the practical operation of Section 45 is to impose this tax upon the sale of goods manufactured outside of the State of Virginia, and not to impose it upon the sale of goods manufactured in Virginia. But we submit that the only operation of Section 45 is to impose a tax based upon the purchases of any concern doing business in this State as a merchant. Its practical operation is to require all merchants to pay a tax based on the sales made in the State of Virginia whether the goods sold are the products of Virginia or some other State. There is no discrimination or attempt to discriminate unjustly against the products of other States; the tax is not sought to be imposed directly

on the imported products or on their sale. It is a tax imposed (as is said by this Honorable Court in several cases which will hereafter be cited) on the business of selling various kinds of goods, some manufactured in Virginia and some outside of that State. *The tax is not affected* in any way by the place at which the goods are manufactured. The tax is based on the purchases, whether the goods so purchased were partly or wholly manufactured in Virginia, or wholly manufactured beyond the boundaries of that State, is not material. The question that decides the amount of tax is the amount of purchases, and these purchases include all the goods sold by the purchaser at a place other than the place of manufacture. Whether the place is outside or inside of the State of Virginia does not matter. Moreover, a *resort to the purchases is simply to ascertain the value of the business done by the merchant and thus obtain the guide to a reasonable conclusion as to the amount of the tax which should be levied*, and we are unable to perceive in that resort any discrimination against goods manufactured outside of Virginia. *There is no levy by the statute upon the purchases themselves, either in form or in fact. They constitute simply the means of ascertaining the value of the privilege conferred. Maine* v. *Grand Trunk R. R. Co. of Canada*, 141 U. S., 217, 35 L. Ed. 994, 996 (1891).

Any incidental disadvantage that the plaintiff in error is under because it has no place of manufacture in Virginia, does not arise from an attempt on the part of the legislature of that State to make a hostile discrimination against such manufacturer. There is a vast difference between an "incidental disadvantage" and a "hostile discrimination." But Section 45 does not even work an "incidental disadvantage" against the plaintiff in error because the manufacturer selling at his place of manufacture in Virginia must pay a tax on the capital employed by him in lieu of the merchant's license.

We have, at the risk or tiresome repetition, attempted to answer specifically, each cahrge made against the validity of the statute in question.

The distinctions which we have made and the principles of law which we have laid down as governing this case have repeatedly been recognized by this court in sustaining the constitutionality of statutes in all respects similar to the one in question.

A very similar question came before this Honorable Court in the case of *New York* v. *Roberts*, 171 U. S. 658, 43 L. Ed. 323 (1898). In that case, a statute of New York was construed which required every corporation organized under the law of New York or any other State or country, and doing business in New York, except certain companies, including *manufacturing corporations wholly engaged in carrying on manufacture within the State of New York*, to pay into the State treasury annually a tax upon its business, based upon the amount of the capital stock actually employed within the State. Parke, Davis & Co., the appellant in that case, was a corporation organized under the laws of the State of Michigan, for the manufacture and sale of chemical and pharmaceutical preparations. Its factory was situated in the city of Detroit. The corporation established a warehouse and depot in the city of New York and there kept on hand varying quantities of its manufactured products, which were there sold at wholesale in original packages. The company paid an annual rental of $12,500.00 for its place of business in New York, and employed fifty persons in its New York branch, and for the years of 1890 to 1894, inclusive, expended for said branch from $102,000 to $172,000. The average stock of goods sent from Michigan and carried in New York was $50,000.00. It also employed in New York, during said years, a continuing capital of from $23,000.00 to $62,000.00, used in the purchase and sale of crude drugs. Upon this state of facts, the comptroller of New York imposed for 1894 and five previous years an annual tax based upon the sum of $90,000.00 as capital employed within the State. Parke, Davis & Co., filed a petition before the Supreme Court of New York, praying for a writ of *certiorari* directed against the comptroller in order to correct the assessment, alleging that, as said company was

a manufacturing corporation, it was exempted from taxation under the laws of the State of New York, and that the comptroller erred in deciding that goods manufactured by said corporation and stored in its depot in New York was capital employed in said State within the meaning of said statute; and that if said statute was correctly interpreted by the comptroller, then said statute was unconstitutional and void as in contravention of the Constitution of the United States and amendments thereto. By successive appeals, the case was brought to the Supreme Court of the United States.

After holding that the construction put upon the statute by the State of New York was binding upon the Supreme Court of the United States, the court took up the contention that the corporation, being a Michigan corporation and having complied with the provisions of the law for transacting business within the State of New York, was denied the equal protection of the law when subjected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within that State, and that such a tax was an unjust discrimination against this Michigan corporation whose place of manufacture was the State of Michigan. This is exactly the contention of the plaintiff in errror in the case at bar. On this point, this Honorable Court said (p. 662):

> "By this contention it is not meant, of course, that this particular corporation is, in terms, discriminated against in the New York statute, but that all corporations which manufacture their goods wholly in other States and send them for sale in New York, are discriminated against in favor of such corporations, whether foreign or domestic, as manufacture their goods within the State of New York.
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> To sustain this contention the well-known line of cases is cited, wherein this court has had to deal with State legislation imposing discriminating taxes against the products of other States. *Walling* v. *Michigan*, 116 U. S. 446; *Robbins* v. *Shelby County Taxing Dist.*, 120 U. S. 489; *Minnesota* v. *Barber*, 136 U. S. 313.
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> If the object of the law in question was to impose a tax upon products of other States while exempting similar do-

mestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that, obviously, such is not the purpose of this legislation. 'Every corporation, joint stock company or association whatever, now or hereafter incorporated, organized or formed under, by or pursuant to law in this State or in any other State or country and doing business in this State * * * shall be liable to and shall pay a tax as a tax upon its franchise or business, into the State treasury annually, to be computed as follows.'

It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations *wholly engaged in carrying on manufacture or mining ores within the State of New York* are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State.

In construing this statute, it was held in the case of *People, Blackington & Co.*, v. *Roberts*, 4 App. Div. 388, that a New York corporation which carried on a manufacturing business in another State, was liable to this tax; and this decision was affirmed by the New York Court of Appeals. 151 N. Y. 652.

The tax is graded according to annual dividends, and originally was assessed upon the entire capital of a corporation; but the statute was amended in 1885 so as to read: 'The amount of capital stock which shall be the basis for tax under the provisions of section three, in the case of every corporation, joint stock company, and association liable to taxation thereunder, shall be the amount of capital stock employed within this State.'

So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States to the detriment of the latter, or to subject property out of the State to taxation."

In *Plummer* v. *Coler*, 178 U. S. 115, 132, 44 L. Ed. 999, at p. 1007, (1900) this Honorable Court, in considering the case of *New York* v. *Roberts*, *supra*, used the following language:

"In *New York* v. *Roberts*, 171 U. S. 658, 43 L. Ed. 323, an effort was made to have a tax imposed against corporations based upon 'capital employed within the State' declared invalid, in that particular case, because a portion of such capital consisted of imported goods in original packages; and this court said:

'Again, it is said that, even assuming that the importation of crude drugs and their sale in the original package constituted a portion of the corporate business, no tax could be imposed by the State under the doctrine of *Brown* v. *Maryland*, 12 Wheat. 419, 6 L. Ed. 678. But that case is inapplicable. Here no tax is sought to be imposed directly on imported articles or on their sale. This is a tax imposed on the business of a corporation, consisting in the storage and distribution of various kinds of goods, some products of their own manufacture and some imported articles. From the very nature of the tax, being laid as a tax upon the franchise of doing business as a corporation, it cannot be affected in any way by the character of the property in which its capital stock is invested'."

Again, in *Southern Railway Co.* v. *Greene*, 216 U. S. 400, at p. 415, 54 L. Ed. 536, at p. 540 (1910), this Honorable Court said:

"In *New York* v. *Roberts*, 171 U. S. 662, 43 L. Ed. 323, a tax was imposed upon the franchises or business of corporations with certain exceptions, computed upon the amount of capital stock employed within the State. It was pointed out by Mr. Justice Shiras, who delivered the opinion of the court, that the tax was imposed as well for New York corporations as for those of other States, and he said: 'So that it is apparent that there is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States, to the detriment of the latter, or to subject property out of the State to taxation'."

Again, the question at issue in the case at bar, was conclusively settled by this Honorable Court in favor of the validity of such a law, in its decision in the case of *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; 45 L. Ed. 269 (1900) where it was held

that the exemption from license taxes of manufacturers selling at the manufactory the articles manufactured there, if applicable to such sales made at any manufactory in the State without regard to the residence, citizenship or domicil of the person, copartnership or corporation, which owns the plant, does not constitute an illegal discrimination against a foreign corporation which has its manufactory in another State and the incidental disadvantage that the foreign corporation is under, that if, instead of selling at the place of business outside of the State, he wishes to establish a place within the State, he is obliged to pay the tax does not constitute a hostile discrimination against him.

In that case, the Reymann Brewing Company, a corporation of the State of West Virginia, with its principal office in the City of Wheeling, filed its bill of complaint in the Circuit Court of the United States for the southern district of Ohio, against Harry Brister, the Treasurer of the County of Jefferson, State of Ohio, asking to restrain and enjoin the said Treasurer from redeeming the possession of said personal property belonging to the Brewing Company, which he had seized in enforcing what was known as the Dow Tax Law of the State of Ohio. Under the terms of the law, it was provided that

> "* * * Upon the business of trafficking in spirituous, vinous, malt or any intoxicating liquors, there shall be assessed yearly and shall be paid into the county treasury, as hereinafter provided, by every person, corporation or copartnership engaged therein, and for each place where such business is carried on by or for such person, corporation or copartnership, the sum of $350.00."

It was alleged by the complainant, whose property had been seized to enforce payment of the assessment, that the statute was void because, by the provisions of Section 8 thereof, it discriminated in favor of the manufacturers and brewers of beer who had their plants located within the State of Ohio, as against those who had their plants located in other States and because it constituted in its practical operation, a regulation of commerce be-

tween the States, which is, in every essential particular, the contention of the plaintiff in error in the case at bar.

In deciding this point adverse to the contention of the plaintiff in error, Mr. Justice Shiras, speaking for the court, said (pp. U. S. Reports 45112-3):

> "So far as the terms of the statute are concerned, they do not disclose any intention to discriminate between foreign and domestic dealers in intoxicating liquors, as the tax in question is to be assessed upon every person, corporation or co-partnership engaged in the business of trafficking in such liquors. But it is contended that the effect of the legislation necessarily results in such a discrimination, because of the provisions of the eighth section of the statute, which is in the following words:
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> 'The phrase 'trafficking in intoxicating liquors,' as used in this act, means the buying or procuring and selling of intoxicating liquors, otherwise than upon prescription issued in good faith by reputable physicians in active practice, or for exclusively known mechanical, pharmaceutical or sacramental purposes, but such phrase does not include the manufacture of intoxicating liquors from the raw material, and the sale thereof, at the manufactory, by the manufacturer of the same in quantities of one gallon or more at any one time.'
>
> The effect of this is claimed to be that the domestic manufacturer may sell liquor, in quantities of one gallon or more, at the place of manufacture without being subjected to the tax, and that thus he has an advantage over the foreign manufacturer, who can only sell, in Ohio, at some other place than the place of manufacture, and is thereby subjected to the tax. In other words, while the domestic manufacturer must pay the tax if he sells at other places than the place of manufacture, yet as he is declared not to be within the act in selling at the place of manufacture in quantities not less than one gallon at any one time, such a provision operates as an illegal discrimination against the foreign competitor, who must necessarily sell at places other than the place of manufacture. than the place of manufacture.
>
> Under this provision, the manufacturers, whether within or without the State, may sell at the manufactory and ship to any part of the State of Ohio, and the incidental disad-

vantage that the foreign manufacturer is under that if, instead of selling at the place of his plant, he wishes to establish a place within the State of Ohio, he is obliged to pay the tax, does not appear to arise out of any intention on the part of the State Legislature to make a hostile discrimination against foreign manufacturers. If an Ohio corporation or copartnership should establish its place of manufacture in another State it would be subjected to the tax, if it sold intoxicating liquor at a place within the State of Ohio; and if a foreign corporation should manufacture at a place within Ohio, it would sell its product, in quantities not less than one gallon, without being subjected to the tax.

A similar contention was disposed of by this court in *New York* v. *Roberts*, 171 U. S. 658, 662. In that case a corporation of the State of Michigan, and having its factory within that State, had a warehouse and store for the sale of its products in the City of New York. A statute of the State of New York enacted that 'every corporation, joint stock company, or association whatever, no wor hereafter incorporated, organized, or formed under, by, or pursuant to law in this State, or in any other State or country and doing business in this State, except * * * manufacturing or mining corporations or companies wholly engaged in carrying on manufacture or mining ores within this State, shall be liable to and shall pay a tax as a tax upon its franchise or business into the State treasury annually,' and that 'the amount of capital stock which shall be the basis for tax * * * in the case of every corporation, joint stock company, and association, liable to taxation thereunder shall be the amount of capital stock employed within this State.'

It was claimed that the Michigan corporation, having come within the jurisdiction of New York by compliance with all the provisions of law imposing conditions for transacting business within the State, was denied the equal protection of the law when subjected to a tax from which were exempted other corporations, foreign and domestic, which wholly manufactured the same class of goods within the State, and that such a tax was an unjust discrimination against the corporation, whose place of manufacture was in the State of Michigan. But this court held otherwise, saying:

'If the object of the law in question was to impose a tax

upon products of other States, while exempting similar domestic goods from taxation, there might be room to contend that such a distinction was constitutionally objectionable as tending to affect or regulate commerce between the States. But we think that obviously such is not the purpose of this legislation. * * * It will be perceived that the tax is prescribed as well for New York corporations as for those of other States. It is true that manufacturing or mining corporations wholly engaged in carrying on manufacture or mining ores within the State of New York are exempted from this tax; but such exemption is not restricted to New York corporations, but includes corporations of other States as well, when wholly engaged in manufacturing within the State.'

So, in the present case, the exemption is not confined to Ohio corporations or copartnerships, but extends as well to foreign corporations whose place of manufacturing is within the State of Ohio; and so, likewise the tax is imposed on Ohio corporations which manufacture goods in other States and establish places for their sale within the State of Ohio, or which, manufacturing within the State, establish places within the State distinct from the manufactory, where their liquors are sold and delivered."

Thus, it will be seen that in *Reymann Brewing Company* v. *Brister*, *supra*, the law of Ohio specifically exonerated a manufacturer from paying a retail tax and allowed him to sell at his place of manufacture without taking out a retail license, and yet the court held that since the exemption was not confined to Ohio persons, corporations or copartnerships, but extended to other corporations whose places of manufacture were within the State of Ohio, and since the tax was imposed upon Ohio corporations manufacturing their goods in other States and establishing places for their sale within the State of Ohio, or with manufacturing within the State, established places within the State distinct from the manufactory where liquors were sold and delivered, the law was not contrary to the Federal Constitution.

It will be noted that the law in the case at bar has the same force and effect as the Ohio law. It is not confined to Virginia corporations, but it extends to foreign corporations whose place

of manufacture is within the State of Virginia, so likewise the tax is imposed upon Virginia corporations which manufacture their goods in other States and establish places for their sale in the State of Virginia, or which manufacture within this State and establish places within this State distinct from the manufactory where their goods are sold and delivered.

The decision in this case, it is respectfully submitted, is squarely in point with the issue raised in the case at bar and must be controlling, and, using the words of Keith, P., in delivering the opinion of the Supreme Court of Appeals of Virginia, "The name being changed the law, as declared" in this case and the case of *New York* v. *Roberts*, 171 U. S. 658; 43 L. Ed. 323, (1898) is, we submit, "precisely applicable" to the case at bar, and disposes of the contention that Section 45 of the Virginia Tax Bill discriminates against the products manufactured in another State.

Counsel for the plaintiff in error attempts to distinguish the case at bar from the case of *New York* v. *Roberts*, *supra*, by saying that in the last named case the constitutionality of the law was sustained because it was a "tax upon the franchise of doing business as a corporation in New York." Counsel for the plaintiff in error does not explain what he means by this, and we have read the statement over time and again, but are frank to admit that we are unable to understand what distinction he is attempting to draw between the two cases, and his brief gives us no light upon the subject, as he contents himself with the mere statement set out above.

A franchise is a privilege granted by a State to exercise certain functions within its borders, and as applicable to the matter in question, is the privilege of doing business in the State of Virginia; and as is said in *New York* v. *Roberts*, *supra*, it is settled by this Honorable Court that subject to certain limitations, a State may impose such conditions upon permitting a foreign corporation to do business within its limits, as it may deem expedient, and that it may make the grant of privilege dependent upon the payment of a specific license tax. In the case at bar, the State of Virginia makes the right of the plaintiff in error to engage in

business in Virginia, that is to say, makes its franchise dependent upon the payment of a merchant's license tax, and to all intents and purposes it would, therefore, appear that the case at bar is also a tax upon the franchise. Be that as it may, the entire contention in *New York* v. *Roberts*, *supra*, as we have before shown, (and which is practically the contention here) was that when a foreign corporation came into the State of New York to do business, it was denying it equal protection of the law when subjected to a tax from which other corporations manufacturing the same class of goods within the State, were exempted, and that such a tax was an unjust discrimination against the manufacturer whose place of manufacture was in another State. So, whatever counsel for the plaintiff in error may have meant to be the distinguishing feature between this case and the case at bar, it is very evident that the contention of the plaintiff in error in the case of *New York* v. *Roberts*, *supra*, and the contention of plaintiff in error in this case, are the same and both cases are governed by the same principle.

Again, counsel for the plaintiff in error attempts to distinguish the case of *Reymann Brewing Co.* v. *Brister*, *supra*, from the case at bar on the grounds that that case was decided upon the theory that the law under consideration in that case was within the exercise of the police power of the State of Ohio. It is only necessary to refer to the lengthy excerpt contained in our brief from this case, to disprove this position. The opinion clearly shows that the question decided was that there was no discrimination against a foreign corporation by the law under consideration. Furthermore, the decision in this case could not have been based on the right of the legislature under the police power because practically all the authorities cited by counsel for the plaintiff in error, and especially the cases of *Walling* v. *Michigan*, 116 U. S. 446 (1886); *Hinson* v. *Lott*, 8 Wall. 148 (1868) and *Brimmer* v. *Rebman*, 138 U. S. 78 (1891) expressly hold that a State cannot, under the guise of the exercise of its police power, be permitted

to unfairly discriminate against the goods and products of another State; and in two of these cases it was expressly held that such a discrimination, when applying to intoxicating liquors rendered the law unconstitutional and void. It can readily be seen, therefore, that for this additional reason, the decision in the case of *Reymann Brewing Co.* v. *Brister*, *supra*, could not have rested on the rights of the State under its police power.

AUTHORITIES RELIED ON BY PLAINTIFF IN ERROR INAPPLICABLE.

To sustain his contention, the plaintiff in error in this case, just as did the plaintiff in error in the case of *New York* v. *Roberts*, 171 U. S. 658; 43 L. Ed. 323 (1898), cites the well-known line of cases in which this Honorable Court has had to deal with State legislation, imposing discriminating taxes against the products of other States. We do not dispute the correctness of the principles governing these decisions. They are manifestly right. Counsel for the plaintiff in error cites a long line of authorities, holding that any statute which injuriously discriminates between articles manufactured in the State over articles manufactured abroad, is unconstitutional and void. It was unnecessary for counsel to cite authorities to sustain this proposition because we recognize it and do not wish in any way to discredit the principles upon which these cases rest. *But these cases are inapplicable.*

In *Woodruff* v. *Parham*, 8 Wall. 123; 19 L. Ed. 382 (1869), one of the cases relied upon by counsel for the plaintiff in error, Mr. Justice Miller, in delivering the opinion of the court, said (p. 387):

> "The case before us is a simple tax on sales of merchandise, imposed alike upon all sales made in Mobile, whether the sales be made by a citizen of Alabama or of another State and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate injuriously against the products of other States or the rights of their citizens, and the case is not, therefore, an attempt to fetter

commerce among the States, or to deprive the citizens of other States of any privilege or immunity possessed by citizens of Alamaba. * * *"

We adopt this language, and say that the case now before this court is a simple tax on sales of merchandise imposed alike upon all sales made in Virginia, whether the sales be made by a citizen of Virginia or of another State, and whether the goods sold are the produce of that State or some other. There is no attempt to discriminate unjustly against the products of other States, and therefore, the authority holding laws which make such discriminations unconstitutional, are inapplicable to the case at bar.

It would seem, therefore, unnecessary to analyze the cases cited by counsel for the plaintiff in error in their brief, and, taking them in their order we shall, in the briefest way, show their inapplicability to the case at bar.

The case of *Commonwealth* v. *Myer*, 92 Va. 809 (1896), recognized the right to impose a tax upon peddlers where it operates uniformly upon all citizens and does not discriminate in favor of citizens of Virginia against citizens of another State, and there is no such discrimination in the law under review. Keith, P., in delivering the opinion of the Supreme Court of Appeals of Virginia in the case at bar, shows that nothing in the case of *Commonwealth* v. *Myer*, is in conflict with the opinion of that court in upholding the constitutionality of the law now in question.

This case is clearly distinguished from *Ward* v. *Maryland*, 12 Wall. 418, 429, 20 L. Ed. 449, 452, ( ), where the court held unconstitutional a statute of Maryland making it a penal offense for any person "not being a permanent resident of that State" to sell, offer or expose for sale in the City of Baltimore, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in the State of Maryland, without obtaining a license for the purpose. The ground for the invalidity of said statute was that it discriminated against the property and products of people of other States. It is submitted that no such ground can be found in the statute herein. The statute is appli-

cable to resident merchants as well as non-resident merchants, and requires a merchant to return as purchases not only goods bought from without the State, but also goods bought from within the State, and the statute does not exempt a manufacturer from paying the tax, whether resident or non-resident, when he establishes a store for the sale of his goods. *The effect of the statute is simply to recognize that manufacturers who have paid a tax upon their capital should have the privilege, without paying any further tax, to sell at the place of manufacture.*

The case at bar is easily distinguishable from *Welton* v. *Missouri*, 91 U. S. 279, 23 L. Ed. 347, 349, (1876), where the court declared invalid a statute of Missouri providing that whoever should deal in the selling of patent and other medicines, goods, wares and merchandise, except books, charts, maps and stationery, which were "not the growth, produce or manufacture of this State," by going from place to place to sell the same, should be deemed a peddler, and prohibiting him, under a penalty, from dealing as such without obtaining a license; but which did not require a license of persons going from place to place and selling the produce or manufacture of the State. It is clear that, in that case, there was a discrimination between goods which were the produce and manufacture of the State of Missouri and those which were the produce and manufacture of other States. But, in the case at bar, a merchant is required to return as purchases, all of his goods, whether of the produce or manufacture of the State of Virginia or of other States, and, as we have seen, these purchases are not taxed but are simply the means of determining the value of the privilege conferred.

We have no desire to question the decision in *Guy* v. *Baltimore*, 100 U. S. 434; 25 L. Ed. 743 (1879) as the principles laid down therein have no application to the case at bar. In that case an ordinance of the City of Baltimore, authorized by the statute of Maryland and in pursuance of which vessels landing at the public wharfs of the city laden with products of other States, were required to pay wharfage fees which were not exacted from ves-

sels landing *thereat*, with the products of Maryland, was declared to be in conflict with the Constitution of the United States. The facts in this case are manifestly different from those in the case at bar. The law under review does not exact from merchants selling the products of other States, any tax which it does not exact from merchants selling products of Virginia.

The case at bar is easily distinguishable from *Webber* v. *Virginia*, 103 U. S. 344, 350, 26 L. Ed. 565, 567, (1881). In that case, Sections 45 and 46 of the Virginia Tax Laws, as they then existed, were so applied as to require an agent for the sale of articles manufactured in other States to obtain a license to sell such articles in each county in which he offered to sell them, while an agent for the sale of articles manufactured in this State, if acting for the manufacturer, was not required to obtain a license or pay any license tax if he was acting for the manufacturer. The court held that the tax demanded was made to depend upon the foreign character of the goods, that is upon their having been manufactured without the State, and, therefore, to that extent, was a regulation of commerce in the articles between the States. It cannot be said, in the case at bar that the question as to whether the tax shall be imposed in a particular case depends upon the foreign character of the articles. Armour & Company is required to return as its purchases all the goods brought by it to its store for sale, whether said goods were produced in Virginia or out of Virginia. The foreign character or the articles offered for sale has nothing to do with the question of the tax in this. To illustrate, Rountree & Company, a Virginia corporation, manufacturing trunks and satchels in Richmond, when it establishes a store in that city, and apart from its manufactory, is required, under the law as it now stands, to return as purchases at its store, all goods brought to such store, and offered for sale there, from other manufacturers or from its own factory; and it is plainly to be seen that there is no distinction in the law whether the corporation in this case is a non-resident corporation,

nor does the statute make any distinction on account of the foreign character of the articles produced and offered for sale.

The next case cited by counsel for the plaintiff in error, *Walling* v. *Michigan*, 116 U. S. 446; 29 L. Ed. 691 (1886) is another of the well-known line of cases in which, as is said in *New York* v. *Roberts*, *supra*, this court has had to deal with State legislation imposing discriminating taxes against the products of other States. The facts in *Walling* v. *Michigan*, *supra*, are so different from the facts in the case at bar and the operation of the statute in that case was so manifestly different from the operation of the statute now in question, that we are at a loss to understand why counsel for the plaintiff in error should have cited it to sustain its position as to the repugnance of the law in question to the Constitution of the United States. In that case it was held that a State law which imposes a specific tax upon persons engaged in the business of selling liquor at wholesale or of soliciting or taking orders for such liquor to be shipped *into the State from places out of the State*, not having their principal place of business in the State *without imposing a like tax upon persons engaged in a like business with reference to liquors manufactured in the State*, is unconstitutional and void because such a law discriminates unfavorably against the citizens and products of other States. It is obvious that the operation of the statute in this case was entirely different from the operation of the statute in the case at bar for the statute now under review imposes upon non-resident manufacturers selling in this State as a merchant his products, no tax which it does not impose on merchants in a like business in reference to products manufactured in the State.

The case of *Brimmer* v. *Rebman*, 138 U. S. 78; 34 L. Ed. 862 (1891) which is expressly stressed by counsel for the plaintiff in error, is in no way similar in facts to the case at bar, as admitted by counsel for the plaintiff in error in their brief, but it is clearly distinguishable therefrom, and from the decisions of this Honorable

Court in *Reymann Brewing Co.* v. *Brister*, 179 U. S. 445; 45 L. Ed. 269 (1900) and *New York* v. *Roberts*, 171 U. S. 662; 43 L. Ed. 323 (1898). In that case, (*Brimmer* v. *Rebman*, *supra*) a Virginia statute prohibited the sale of any part of an animal that had been slaughtered at a distance of 100 miles or over from the place of sale, unless it had first been inspected by an inspector who was given for such service a fee so excessive that its effect was to create a prohibition of the sale in Virginia of the enumerated meats, although entirely wholesome, if from animals slaughtered 100 miles or over from the place of sale. This statute was very properly held to be invalid as it clearly discriminated against meat slaughtered at a distance of 100 miles from the place of the sale, which would have the effect of prohibiting the sale in Virginia of meat, although wholesome, if slaughtered *outside* of the State, except when sold under such circumstances as to give butchers of the locality of sale an unfair and excessive advantage over such competitors. The essential principle laid down in this case is found in the following quotation from the opinion of Mr. Justice Harlan (pp. 676-7):

> "* * * The statute is, in effect, a prohibition upon the sale in Virginia of beef, veal or mutton, although entirely wholesome, if from animals slaughtered one hundred miles or over from the place of sale. We say prohibition, because the owner of such meats cannot sell them in Virginia until they are inspected there; and being required to pay the heavy charge of one cent per pound to the inspector, as his compensation, he cannot compete, upon equal terms, in the markets of that Commonwealth, with those in the same business, whose meats, of like kind, from animals slaughtered within less than one hundred miles from the place of sale, are not subjected to inspection at all. Whether there shall be inspection or not, and whether the seller shall compensate the inspector or not, is thus made to depend entirely upon the place where the animals from which the beef, veal or mutton is taken, were slaughtered. * * * The owner of the meats here in question, although they were from animals slaughtered in Illinois, had

> the right, under the Constitution, to compete in the markets of Virginia upon terms of equality with the owners of like meats, from animals slaughtered in Virginia or elsewhere within one hundred miles from the place of sale. Any local regulation which, in terms or by its necessary operation, denies this equality in the markets of a State, is, when applied to the people and products or industries of other States, a direct burden upon commerce among the States, and therefore void. * * *"

It will, therefore, be readily seen, as we have heretofore pointed out, that the rule laid down in this case is in no way applicable to the facts in the case at bar. There is nothing in the Virginia law which would prevent Armour & Company, or any other foreign corporation from establishing a manufacturing plant in this State, and from there selling the products of its factory without being required to first obtain a merchant's license. On the other hand, a Virginia corporation, which maintained its manufacturing plants outside of the limits of the Commonwealth of Virginia, under this statute, is required to obtain a merchant's license before it can dispose of its products in this State since, having no manufacturing plant located within the confines of Virginia, it would be unable to take advantage of that portion of the law which permits such products to be sold at the place of manufacture without additional tax. It is, therefore, seen that the Virginia Tax Law, here under consideration, does not discriminate, as we have before pointed out, between Virginia manufacturers and manufacturers of other States, or as to the goods produced by such manufacturers.

Nor was the law construed in *Darnell* v. *Memphis*, 208 U. S. 113; 52 L. Ed. 413 (1908) in any respect similar in its operation to the law now under review. In that case a statute imposed a tax upon the products of the soil of other States, but exempted like products when produced from the soil of Tennessee, and it was held that such a law was unconstitutional as it directly interfered with interstate commerce. Mr. Justice White, in delivering the opinion of the court, said (p. 125):

> "* * * the disputed tax, which the court below sustained, was a direct burden upon interstate commerce, since the law of Tennessee *in terms discriminated against property the product of the soil of other States, brought into the State of Tennessee, by exempting like property* when produced from the soil of Tennessee. * * *" (Italics ours).

We repeat that the law now under review makes no distinction in regard to the purchases made by merchants of goods manufactured in Virginia, and those manufactured outside of Virginia, and clearly the principles laid down in *Darnell* v. *Memphis*, *supra*, have no application to the question in issue here.

The principles distinguishing the cases cited by counsel for the plaintiff in error, and the cases of *Reymann Brewing Co.* v. *Brister*, *supra*, and *New York* v. *Roberts*, *supra*, are too apparent to be the subject of real mistake or confusion in the application thereof to the facts in the case at bar. As we have before pointed out, the principles laid down in the cases cited by counsel for the plaintiff in error are not questioned by us, but we submit that these principles have been misapplied in attempting to bring the statute now in question under them.

Counsel for the plaintiff in error calls to task the Supreme Court of Appeals of Virginia for failing to refer to the cases upon which they rely, or to reconcile them with the cases of *New York* v. *Roberts*, *supra*, and *Reymann Brewing Co.* v. *Brister*, *supra*, but we submit that there was no necessity of referring to such cases because they were not applicable to the question at issue nor was it necessary to reconcile them because there is no conflict.

Counsel for the plaintiff in error have not been able to find any cases which question the validity of the decision upon which we rely, nor have their great ingenuity and analytical skill been able to point out any particulars in which the doctrines laid down are inapplicable to the case at bar, and we submit that the case at bar must be determined by the principles firmly established by the cases relied on by us in this brief, and that, applying these

principles, it clearly appears that Section 45 of the Virginia Tax Law is not repugnant in any respect to the Constitution of the United States.

For these reasons and for the reasons given by the Supreme Court of Appeals of Virginia in its opinion in this case (R. pp. 58 to 66, inclusive), we respectfully submit that the judgment of the Supreme Court of Appeals of Virginia is correct and should be affirmed.

Respectfully submitted,

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December 1, 1917.

Office Supreme Court, U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1917.

No. 127.

ARMOUR AND COMPANY

versus

COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

H. T. HALL,
EPPA HUNTON, JR.,
Counsel for Plaintiff in Error.

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IN ERROR TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

Counsel for defendant in error in their brief (page 30), say:

> "Counsel for the plaintiff in error attempts to distinguish the case at bar from the case of *New York* vs. *Roberts*, *supra*, by saying that in the last named case the constitutionality of the law was sustained because it was a 'tax upon the franchise of doing business as a corporation in New York.' Counsel for the plaintiff in error does not explain what he means by this, and we have read the statement over time and again, but are frank to admit that we are unable to understand what distinction he is attempting to draw between the two cases, and

his brief gives us no light upon the subject, as he contents himself with the mere statement set out above.

"A franchise is a privilege granted by a State to exercise certain functions within its borders, and as applicable to the matter in question, is the privilege of doing business in the State of Virginia; and as is said in *New York* vs. *Roberts*, *supra*, it is settled by this Honorable Court that subject to certain limitations, a State may impose such conditions upon permitting a foreign corporation to do business within its limits, as it may deem expedient, and that it may make the grant or privilege dependent upon the payment of a specific license tax. In the case at bar, the State of Virginia makes the right of the plaintiff in error to engage in business in Virginia, that is to say, makes its franchise dependent upon the payment of a merchant's license tax, and to all intents and purposes it would, therefore, appear that the case at bar is also a tax upon the franchise."

The recognition of the existence of a foreign corporation by another State depends upon the comity of that State. Having no absolute right of recognition in States other than that of its creation, but depending upon their assent, it follows that such assent may be given upon such terms and conditions as those States may think proper to impose. They may exclude the corporation entirely unless it is engaged in interstate or foreign commerce, or where the corporation is in the employ of the general government. The State may require the corporation to pay a specific license tax, or a sum proportioned to the amount of its capital stock, or it may require the corporation to become subject to a tax law.

Horn Silver Mining Co. vs. *New York*, 143 U. S. 305.

In the last named case this court was considering the same New York statute it was considering in *New York* vs. *Roberts*, 171 U. S. 658.

In the last named case, the Court says:

> "It must be regarded as finally settled by frequent decisions of this Court that subject to certain limitations as respects interstate and foreign commerce, a State may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient, and that it may make the grant or privilege dependent upon the payment of a specific license tax, or of a sum proportioned to the amount of its capital used within the State."

Judge Harlan, in his dissenting opinion in that case, says:

> "The New York statute has not assumed to prescribe any rule applicable alike to all manufacturing corporations or companies of other States. It exempts from taxation all corporations or companies, whether of New York or of other States, that wholly carry on their manufacturing business in New York."

From these quotations it appears that Parke Davis and Company were permitted to do business in the State of New York, subject to the terms and conditions of the New York statute, which requires that it "shall be liable to and shall pay a tax as a tax upon its franchise or business," to be computed as set out in the statute.

Compliance with the terms of this statute by it is necessary for it, in order to do business in New York. The State imposes this as the condition upon which it may do business within its territory.

There is no general statute permitting a foreign corporation to become domesticated and to do business in the State of New York.

What are the facts in the instant case? Armour and Company was a foreign corporation which had already obtained the permission of the State of Virginia to do business within the State, under the terms and provisions of a general statute.

The first allegation of its bill, after stating that it is a New Jersey Corporation, is as follows:

"That your complainant is a non-resident corporation, duly licensed and qualified to do business in the State of Virginia, by having qualified to do business in Virginia by obtaining a certificate of authority to do business in Virginia and by paying the annual registration fees, in accordance with the statute in such cases made and provided"

Section 1104 of Volume 3, Virginia Code, Supplement 1910, page 137, is in part as follows:

"Every incorporated company doing business in this State shall have an office in the State, at which all claims against the company due residents of the State may be audited, settled and paid. Every such company incorporated under a jurisdiction beyond the limits of this State (and hereinafter designated as a foreign corporation) shall, before doing business in this State, present to the State corporation commission (a) a written power of attorney executed in duplicate, appointing some person residing in this State its agent, upon whom all legal process against the corporation may be served, and who shall be authorized to enter an appearance in its behalf; (b) two duly authenticated copies of the charter of the corporation; and (c) a certificate of the auditor of public accounts, showing the payment into the treasury of the fee required by law to be paid by such corporation, and shall obtain from said corporation commission a certificate of authority to transact business in the State. If it shall be made to appear to the State corporation commission that said corporation has complied with the law relative to the obtaining of a certificate of authority for foreign corporations of the character of the applicant corporation, then said corporation commission shall issue to said corporation a certificate of authority to transact business in the State."

The complainant in the bill alleges that it had obtained such a certificate of authority to do business in Virginia, and had also paid the annual registration fees required by statute in such cases.

From this it is clear that at the time the plaintiff

in error applied for a merchant's license in Virginia it had been domesticated and permission had been given to it and it had been duly authorized by the State of Virginia to do business in Virginia.

The tax imposed in *New York* vs. *Roberts, supra*, was a tax upon its franchise or business, and was the condition upon which a foreign corporation was permitted to do business in New York, while Armour and Company had already been given permission to do business in Virginia by complying with the terms and provisions of a general statute before it applied for a merchant's license tax, the validity of which is involved in this case.

It seems clear from this that counsel for defendant in error are mistaken when they state in their brief that "in the case at bar the State of Virginia makes the right of the plaintiff in error to engage in business in Virginia, that is to say, makes the franchise dependent upon the payment of a merchant's license tax and to all intents and purposes it would therefore appear that the case at bar is also a tax upon the franchise."

This also makes it clear that the learned President of the Supreme Court of Appeals of Virginia was in error when he said after quoting from *New York* vs. *Roberts, supra* (Record, page 63), "The name being changed, the law as there declared is we think precisely applicable to the case in hand." The two cases are absolutely different, and involve different principles. *New York* vs. *Roberts* is a case where a New York statute prescribed the terms upon which a foreign corporation is permitted to do business in that State. By the terms of the statute, "it shall be liable to and shall pay a tax upon its franchise or business into the State treasury annually." In the instant case Armour and Company had obtained a certificate of authority to do business in Virginia and had paid its annual registration fee in pursuance of the general statute of the State. After having obtained the certificate of authority to do business in Virginia it desires to obtain a merchant's license which is graded upon the amount of its purchases, and it main-

tains that if it is required to have its purchases include articles manufactured by it outside of the State of Virginia, that the object of the statute is to impose the tax upon goods not manufactured in Virginia and to exempt goods manufactured in Virginia from this tax, and that the practical operation of the statute therein discriminates against goods manufactured out of Virginia and in favor of goods manufactured in the State.

It is therefore maintained that the case of *New York* vs. *Roberts* does not sustain the position of counsel for the defendant in error, and is not even persuasive authority.

The case of *Plummer* vs. *Coler*, 178 U. S. 115, is also cited in the opinion of the Supreme Court of Appeals as sustaining the position of counsel for the defendant in error.

That case holds that the right to take property by will or descent is derived from and regulated by municipal law, and that the State in assessing a tax upon such right or privilege may fix the amount of the tax by referring to the value of the property passing, and the incidental fact that such property is composed in whole or in part of Federal securities does not invalidate the State tax or the law under which it is imposed.

The case of *New York* vs. *Roberts*, *supra*, is cited in that case with reference to the effort therein made to have the tax imposed against corporations based upon "capital employed within the State" declared invalid in that particular case, because a portion of such capital consisted of imported goods in original packages.

This question is in no way related to the question involved in the instant case.

The case of *Reymann Brewing Co.* vs. *Brister*, 179 U. S. 445, is also cited in the opinion of the Supreme Court of Appeals of Virginia, as sustaining the position of counsel for the defendant in error.

In that case the validity of the Ohio Dow Liquor Law, was involved which levies a tax upon liquors sold, except those manufactured from raw material, and the

sale thereof at the manufactory by the manufacturer in quantities of one gallon or more at any one time. The Court says that if the object of the law in question was to impose a tax upon products of other States while exempting similar domestic goods from taxation there might be reason to contend that such a distinction was constitutionally objectionable, but that this is obviously not the purpose of the legislation, because the taxes are imposed upon corporations of that, as well as those of other States, and cities *New York* vs. *Roberts* as authority for that proposition.

The Court holds that the Dow law is within the scope of the police power of the State, and does not discriminate between foreign and domestic dealers.

In the present case it is admitted that Section 45 of the Tax Law by the construction put upon it by the Supreme Court of Appeals of Virginia applies alike to foreign and domestic corporations, and is therefore not subject to any constitutional objection in that respect, and that proposition is decided in *Reymann Brewing Company* vs. *Brister*, and is not denied.

However, counsel for defendant in error in his brief (page 31) in discussing this case, says:

> "Again counsel for the plaintiff in error attempts to distinguish the case of *Reymann Brewing Co.* vs. *Brister, supra*, from the case at bar, on the grounds that that case was decided upon the theory that the law under consideration in that case was within the exercise of the police power of the State of Ohio. It is only necessary to refer to the lengthy excerpt contained in our brief from this case, to disprove this position. The opinion clearly shows that the question decided was that there was no discrimination against a foreign corporation by the law under consideration."

The Court did hold as stated that there was no discrimination by the Dow law against a foreign corporation. It did also decide that there was no discrimination against a foreign corporation because the Dow law ap-

plied equally to foreign and domestic corporations, but the Court distinctly holds that the law draws a line between a distillery and a brewery on the one hand, and a saloon on the other, and that in exempting sales of one gallon or more at the place of manufacture and in imposing a tax upon such sales made elsewhere "the legislature of Ohio was, in the exercise of its police power, aiming to restrict the evils of saloons, or places where liquors are drunk."

It is thus clear that this case is distinctly based and the statute sustained upon the police power of the State.

Counsel for defendant in error cite in their brief *Southern Railway* vs. *Greene*, 216 U. S. 400, as sustaining their position.

In that case *New York* vs. *Roberts*, *supra*, is quoted as deciding that as the tax in that case was imposed on New York corporations as well as on those of other States: "There is no purpose disclosed in the statute either to distinguish between New York corporations and those of other States to the detriment of the latter, or to subject property out of the State to taxation."

It has never been denied that this is a sound proposition. The contention of counsel for the plaintiff in error is that the history of Section 45 of the Virginia Tax Bill shows that its object was to impose a merchant's license tax upon the sale of goods manufactured outside of the State, while exempting from this tax practically all of the goods manufactured in the State, and that this is the practical operation of the statute.

It is maintained that this section of the tax law is not brought into harmony with the constitution by the fact that it purports alike to apply to resident manufacturers as well as to non-resident manufacturers, and that it cannot be sustained simply because it applies alike to all manufacturers who sell or offer to sell goods at a place other than the place of manufacture.

The Court will look deeper into the matter than the language of the statute, and see whether the history of the legislation shows that its object was to impose a tax

on goods not manufactured in the State while exempting goods manufactured in the State from the tax. The Court will look further into the matter to see whether the practical operation of Section 45 will impose this tax on the non-resident manufacturer, and exempt the resident manufacturer. If either is true, the tax is discriminatory and unconstitutional.

It is clear:

(1) That this statute was amended in order to meet the case of *Morris & Co.* v. *Commonwealth*, 116 Va. 912 (opinion of the Supreme Court of Appeals of Virginia, Record, page 60), a case in which an effort to subject a non-resident corporation to a merchant's license tax was defeated.

(2) That in the form of interrogatories for merchants applying for State license, prepared by the Auditor of Public Accounts, Exhibit No. 1 with the bill (Record, page 34), the applicant for a merchant's license is required to state "What amount of goods, wares and merchandise were bought by you during each of the following named months (including goods, wares and merchandise manufactured by you outside of Virginia, bought or shipped therein for sale by you at . . . . . Virginia).

The applicant was not required to include in his application the amount of goods manufactured by him in Virginia wherever they might be sold, either at the place of manufacture or anywhere else.

(3) The Auditor of Public Accounts made no effort to have goods manufactured in Virginia and sold or offered for sale at a place of business not the place of manufacture considered in fixing the amount of the merchant's license tax until driven to it by this litigation.

The original injunction order in this case was granted May 18, 1915, (Record, page 28 & 29). On the next day, to-wit, May 19, 1915, the Auditor sent out special

instructions to the Commissioners (Record, pages 43 to 46), in which he directs the merchant to include in his application for a merchant's license a statement of the amount of goods, wares and merchandise "manufactured by you to be offered for sale at said place of business, which is not the place of manufacture." On the same day he addressed a letter to the Commissioners of the Revenue, which will be found in the Record at page 47.

It is a fair conclusion that these new instructions in this letter were produced by the injunction granted on the preceding day by the Circuit Court of the City of Richmond.

(4) The practical operation of Section 45 of the Tax Bill is to impose a merchant's license tax upon goods manufactured outside of Virginia, and to exempt from this tax all goods manufactured in Virginia, sold at the place of manufacture. It cannot be denied that the great bulk of manufactured articles are sold at the place of manufacture, and that the practical operation of this statute will be to discriminate against goods manufactured outside of Virginia and in favor of goods manufactured in Virginia. It is maintained that the object of the statute was to effect this discrimination, and to compel the manufacturer whose goods were manufactured out of Virginia and sold by the manufacturer in Virginia to pay a merchant's license tax from which the resident manufacturer is exempt, and that the operation of this statute accomplishes this result.

It is further maintained that the principles established by this Court in the case of *Brimmer* v. *Rebmann*, 138 U. S. 78, determine that the judgment of the Supreme Court of Appeals of Virginia in this case should be reversed, and that a burden imposed by a State is not to be sustained simply because the statute imposing it applies alike to the corporations of all the States, including the State enacting the statute. But if the object or result of the statute is a burden upon bringing into the

State goods manufactured out of the State, and this burden is not imposed upon goods manufactured in the State as well, the statute is unconstitutional and void.

Respectively submitted,

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Counsel for Plaintiff in Error.